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L'ASSOCIATION DU BARREAU CANADIEN

Report of the
Canadian Bar Association

Making the Case:

The Right to Publicly-Funded
Legal Representation
in Canada

February 2002

**THE RIGHT TO PUBLICLY-FUNDED LEGAL
REPRESENTATION IN CANADA**

MAKING THE CASE

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FOREWORD

I am proud to present the Canadian Bar Association's Report examining the basis for a constitutional right of Canadians to true access to justice through publicly-funded legal services. Last spring, I invited a number of experts in the fields of constitutional law and access to justice to consider this issue for our project. I was delighted when they agreed, and with the stellar papers that were submitted as a result.

It is apparent from reading these opinions that at present, Canada's policy makers do not have a clear constitutional obligation to ensure that Canadians can actually access our justice system to enforce their legal rights. While there is an implied right to legal aid in certain circumstances, the parameters of this right are cloudy. The good news is that our experts believe that the time is right for extending entitlement to legal aid – to cover more types of cases and to make more people eligible for publicly-funded legal representation.

While the opinions provide cause for optimism, the CBA's work in promoting greater access to justice through improved legal aid is certainly not complete. Government leaders are faced with a choice. They can sit back and let our most vulnerable citizens struggle, likely for many years, to expand and establish meaningful legal rights by representing themselves or with the assistance of members of the legal profession committed to *pro bono* work and to legal aid, in spite of its hardships. This is a long hard road to travel, and in the meantime, most poorer Canadians will be out of luck. The other path, the path we believe it is incumbent upon our leaders to take, is to accept responsibility now for clarifying and expanding the right of all Canadians to the legal representation they need.

This Report will ground the CBA's commitment to relentlessly urge all governments to do the right thing by taking leadership roles and pursuing the second path – the path of genuine access to justice.

Yours,

A handwritten signature in black ink that reads "Daphne E. Dumont". The signature is written in a cursive, flowing style.

Daphne Dumont, Q.C.
Past-President

THE RIGHT TO PUBLICLY-FUNDED LEGAL REPRESENTATION IN CANADA

MAKING THE CASE

Vicki Schmolka

Introduction

In June 2001, the President of the Canadian Bar Association invited lawyers, law professors and legal theorists to prepare short opinions on the constitutional right to legal aid in Canada, particularly the right to publicly-funded legal representation in civil law cases. Eight experts wrote opinions examining the constitutional foundations for criminal and civil legal aid services in Canada and suggesting legal arguments that could be used to make sure that people at the lowest income levels have access to these publicly-funded services when they need them.

It is understood that without legal aid, a segment of the population cannot take advantage of the protections and guarantees offered by our legal system and are therefore denied access to justice. To protect the integrity of our legal system and to give full meaning to the constitution that supports it, everyone in Canada must have access to the courts and, by extension, to the knowledge and legal advice that make access to the courts and to justice meaningful. For people at the lowest income levels in our country, for people who cannot afford adequate housing, food or clothing, for people who work at a minimum wage

level or below and have families to support, for people who are disabled and dependent on social assistance, hiring legal counsel is an impossibility. This raises two fundamental questions: When does the state have a responsibility to step in and fund legal services to these low income members of our society to protect their right to access to justice? When does the state have a legal duty to provide legal aid services to them?

The Canadian Bar Association's interest in these questions comes from its members who witness the consequences of having unrepresented people flounder in our justice system. A person who cannot afford legal advice and does not qualify for legal aid services may not understand the legal options available or the impact of the law, in all its complexities, on his or her situation. A person who is in court without a lawyer or without the benefit of legal advice may not be able to make arguments clearly, to cross-examine witnesses effectively or to suggest how the law should be interpreted in the case. In attempts to make the system as fair as possible in the circumstances, judges may feel compelled to assist an unrepresented person by explaining the law that applies,

asking witnesses questions and taking a more active role than usual. Walking the fine line between assisting an unrepresented person and preserving impartiality is a difficult challenge for the judiciary.

Every day, CBA members see the frustrations, share the delays and recognize the costs as unrepresented people struggle to assert their rights. They know that justice is not being served and that justice will not be

served until the poorest in our society have equal access to legal advice and to the courts.

This Report reviews the legal arguments, presented by the essay authors, which litigators and policy makers can use to challenge the limited availability of legal aid in Canada and to argue for increased criminal and civil legal aid coverage. There is a case to be made for true access to justice in Canada.

Part 1 - An Overview

Is there a constitutional right to legal aid?

The short answer is “no.” There is no constitutional right to legal aid in criminal or civil law cases in Canada. Neither the *Constitution Act, 1982* nor the *Canadian Charter of Rights and Freedoms* explicitly states that a person who is impoverished and cannot afford a lawyer must be provided with one through a publicly-funded legal aid service.¹

In the 1994 case *R. v. Prosper*, the Supreme Court of Canada considered whether or not the subsection 10(b) *Charter* right to retain and instruct counsel without delay after arrest or detention imposes an obligation on government to provide legal services to a person who has been arrested or detained. The court found that the subsection 10(b) right to consult counsel did not include a right to free legal advice through a 24-hour a day duty counsel service. The police must give someone they arrest the immediate opportunity to consult a lawyer but there is no state obligation to provide or pay for that lawyer.²

Interestingly, some of the judges in *Prosper* reflected on the drafting process that led to the final wording of the *Charter*,³ noting that an amendment requiring publicly-funded counsel had been rejected. Chief Justice Lamer warned against ignoring this fact and L’Heureux-Dubé, J. said that she was not prepared to use the “living tree” approach to constitutional interpretation to “add a provision which was specifically rejected at the outset.”⁴ Professor McCallum draws this conclusion: “*Prosper* thus creates a significant barrier to arguing for a general right to state-funded counsel even in the criminal law context.”⁵

Is there a right to legal aid in some circumstances?

Yes, there is. While the authors agree that there is no entrenched constitutional right to legal aid in Canada, they argue that common law, case law, statutes, the constitution, the *Charter*, and the rule of law that is the underpinning to our democracy all offer the grounds for individuals to claim a right to legal aid in certain circumstances.

Historically, the right to publicly-funded legal services has been most evident in the criminal law sphere. When the state lays criminal charges, the risks to an accused's liberty and security are significant and the need for a fair trial paramount. As a result, courts have the power to order⁶ and have ordered⁷ that publicly-funded counsel be made available to an accused to ensure a fair trial.

The right to publicly-funded counsel in civil matters is a more recent development, with the 1999 Supreme Court of Canada decision in *New Brunswick (Minister of Health and Community Services) v. G.(J.)* recognizing the need for publicly-funded counsel in a case involving the government's actions to keep three children as temporary wards of the Crown. The court ruled that a fair hearing could not take place if the parent did not have legal representation and that she did not have the financial means to hire counsel. The decision, however, spoke of the "unusual circumstances of the case" [para. 83] and so provides only a narrow foothold in the quest to establish a right to publicly-funded counsel in civil law matters.

Before we move on to a detailed review of the legal arguments that the authors suggest can be used to expand the right to publicly-funded legal services in criminal and civil law cases, it is important to note that legal aid services have been available throughout Canada for almost 30 years.⁸ The federal government began providing the provinces and territories with funds, through cost-sharing agreements, for criminal legal aid services in 1972, setting coverage minimums (for example: to provide legal aid to an accused charged with an offence for which incarceration

was likely upon conviction). Originally, criminal legal aid costs were shared 50/50 but the federal government capped its contributions in the early 1990's. Federal funding for civil legal aid began in the late 1970's and is now part of the federal block transfer payment made to each province, without stipulation that any specific portion must be used for legal aid services. Given the Attorney General of Canada's responsibility for the administration of justice in the North, there are specific legal aid agreements with the territories covering criminal and civil legal aid and related services such as courtworker and public legal education programs.

Clearly, governments have acknowledged the need to provide legal aid services to people with little or low income and the responsibility to remove barriers that may prevent people from enjoying the rights to which they are entitled under Canada's system of justice. Legal aid services exist, however, as a question of policy not as a matter of right.

One last point, lawyers support access to justice in many ways: accepting legal aid cases even though they are paid below their usual rate; continuing to work on a legal aid case even though they have spent more time than the tariff allows (and are therefore working for free); participating in hold-back plans which withhold part of the lawyer's fee until all legal aid accounts for the year are settled, with the hold-back only being paid out if there is no deficit in the province's legal aid budget; transferring interest on trust accounts to legal aid plans; volunteering to sit on legal aid committees; and, of course, accepting to work for clients outside the legal aid system for reduced or no pay (*pro bono* work). Although these significant contributions improve access to justice for

low income individuals, the effort is a matter of individual choice, of personal policy.

The questions therefore remain: When does the state have a legal duty to provide legal aid services to the lowest income members of our society? Or, put another way, when does an individual have the right to the services of a lawyer, paid for by the state? And, if this duty or right does not yet exist in law, what opportunities are there for arguments to establish it?

The *Charter* guarantees

There are four key sections⁹ of the *Canadian Charter of Rights and Freedoms* which are most relevant to this discussion:

Section 7 guarantees everyone “the right to life, liberty and security of the person” and says that this right can only be taken away according to “the principles of natural justice.”¹⁰

Subsection 11(d) guarantees that anyone charged with an offence is innocent until proven guilty at a “fair and public hearing.”¹¹

Section 15 guarantees everyone “equal protection and equal benefit of the law without discrimination” and sets out an illustrative list of illegal grounds of discrimination. It also permits programs designed to remedy discriminatory situations.¹²

Section 24 guarantees a remedy to anyone whose *Charter* rights have been infringed or denied access to the courts.¹³

The *Charter* can be used to assert the right to publicly-funded counsel in both criminal and civil law situations.

Part 2 - Criminal Law and the Right to Publicly-Funded Legal Representation

The situation before the *Charter* came into effect

The right to a fair trial has been a part of our criminal justice system since its inception and, as Professors Bala and Roach point out,¹⁴ it falls to judges to uphold this right.¹⁵ Even before the *Charter* came into effect, judges were prepared, in some cases, to order the appointment of counsel or to stay proceedings until counsel had been provided to an accused, given the complexity of the case and the accused’s

abilities to act without legal representation.¹⁶ Recognition of this authority is found in the Ontario Court of Appeal decision in *R. v. Rowbotham*, a post-*Charter* case which will be discussed in a moment.

[T]here may be rare circumstances in which legal aid is denied but the trial judge, after an examination of the means of the accused, is satisfied that the accused, because of the length and complexity of the proceedings or for other reasons, cannot afford to retain counsel to the extent necessary to ensure a fair trial. In those

circumstances, even before the advent of the Charter, the trial judge had the power to stay proceedings until counsel for the accused was provided. (emphasis added)¹⁷

As noted earlier, the *Criminal Code* gives appellate judges the right “in the interests of justice” to order publicly-funded counsel for an accused appearing before them or in “proceedings preliminary or incidental to an appeal.”¹⁸ This statutory authority also pre-dates the *Charter*.

Professor Roach believes that given the risks of wrongful conviction or other miscarriages of justice when an accused is not able to afford a lawyer or is denied legal aid, the courts could apply the principles of fundamental justice to “require that an accused who cannot afford a lawyer have some type of legal aid made available to him or her in most if not all criminal cases.”¹⁹ This may be a possibility, but, to date, the courts have only required the appointment of counsel in a few cases when legal aid was not provided to the accused.

Post-Charter: the right to legal representation

As Professor McCallum notes “*R. v. Rowbotham* is commonly cited as authority for the right of the accused to have state-funded counsel if necessary to ensure a fair trial.”²⁰ This Ontario Court of Appeal decision concerns an accused charged in a drug trafficking case involving several co-accused. The accused’s request for legal aid had been denied because she was considered to have the means to pay for a lawyer. The Court of Appeal found that she did not have sufficient funds to pay counsel for a trial that was expected to go on for 12 months.

Acknowledging that there is no constitutional right to legal aid, the court, in a unanimous decision, held that “in cases not falling within provincial legal aid plans, subsection 7 and 11(d) of the *Charter* ... require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial.”²¹ The court ordered a re-assessment of the accused’s ability to pay for counsel considering the defence requirements in the case and suggested that legal aid might provide counsel for parts of the trial. It did not order counsel to be provided and acknowledged that the decision of legal aid authorities concerning a person’s financial means were “entitled to the greatest respect.”²² The court also noted that relying on volunteer counsel to represent an accused without sufficient finances to pay for counsel was not really feasible or fair, considering the length and complexity of some present-day trials and law firm overhead costs.²³

Following the *Rowbotham* decision, a test has evolved to determine if an accused must be represented by counsel for proceedings to be in accordance with the principles of fundamental justice.

First, the accused must show, on a balance of probabilities, that he or she is unable to hire counsel privately or to receive legal aid. Courts generally require some proof of financial status and evidence that an application was made to legal aid and rejected.²⁴

Second, the accused must establish that the proceedings are both serious and complex. Usually, but not always,²⁵ incarceration must be a possible consequence of conviction. For instance, the courts have

found the need for counsel for an accused charged with narcotics and firearms offences (*R. v. Lewis*) and unlawful confinement and assault (*R. v. Anderson*). However, the courts have held that an accused could have a fair trial without the assistance of counsel on charges of common assault (*R. v. Satov*) and driving while impaired and failing to comply with a demand for a breath sample (*R. v. Rain*) and in extradition proceedings (*United States of America v. Akrami*).²⁶

Third, the court must find that the accused lacks the ability to represent him or herself effectively. How articulate is the accused? What is the accused's level of education? Does the accused understand what to prove as a defence to the Crown's evidence? Will the accused be able to cross-examine witnesses? Can the accused present evidence and make arguments?²⁷ All these questions speak to the assessment of whether or not the accused will have a fair trial, if unrepresented by counsel.

In conclusion, a person accused of a criminal offence in Canada today who cannot afford a lawyer and who is denied legal aid does not have a right to be represented by publicly-funded counsel. However, depending on the circumstances in a particular case, the court may stay proceedings until the accused is represented by counsel or order the appointment of counsel, basing the decision on *Charter* section 7 and subsection 11(d) rights; on common law principles that require respect for the fundamental principles of justice; or on the *Rowbotham* case and subsequent court decisions. As well, at the appellate level, judges can appoint counsel for an accused in the interests of justice.

It therefore rests on an individual accused, who does not have access to legal aid and who cannot afford to hire counsel, to make the case that a trial must not go forward unless he or she is represented by counsel and to hope that the court will agree.

Part 3 – Civil Law and the Right to Publicly-Funded Legal Representation

The Supreme Court of Canada decision in *G.(J.)*

While *Rowbotham* is the lead case on the criminal law side; *New Brunswick (Minister of Health and Community Services) v. G.(J.)* is the lead case on the civil law side. This 1999 landmark case recognizes the right to publicly-funded counsel in civil law cases. The province's community services were asking the court to extend, for another six months, a temporary Crown wardship order which

had removed a mother's three children from their home. The mother was a recipient of social assistance but, in spite of being at the lowest income level, was not eligible for legal aid because the province's legal aid plan only covered cases involving the permanent removal of a child from a parent's care.

Since the proceeding was not criminal in nature, the rights in subsections 10(b) and 11(d) of the *Charter* were not at issue. The Supreme Court of Canada focused on the

meaning and application of section 7 of the *Charter*. The court was unanimous in finding that the trial judge should have ordered the province to provide the mother with publicly-funded counsel. The majority judgment found that the mother's and children's section 7 rights to "security of the person" were in jeopardy.

Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby threatening to violate both the appellant's and her children's section 7 right to security of the person. [para. 81]

Without counsel to represent the mother, the court could not ensure that the temporary wardship proceedings were "in accordance with the principles of fundamental justice."

Thus, the interests of fundamental justice in child protection proceedings are both substantive and procedural. The state may only relieve a parent of custody when it is necessary to protect the best interests of the child, *provided that there is a fair procedure for making this determination* [para. 70] ... The interests at stake in the custody hearing are unquestionably of the highest order. Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent's right to security of the person at stake, the child's is as well. Since the best interests of the child are presumed to lie with the parent, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship. [para. 76, *emphasis added*]

Chief Justice Lamer considered these factors in deciding that counsel was necessary in this case: "the seriousness of

the interests at stake, the complexity of the proceedings, and the capacities of the appellant." [para. 75] He also noted that it would be rare for a section 1 argument to succeed in overriding the section 7 right in individual cases because the objective of limiting legal aid expenses was not a sufficient justification given the importance of the section 7 right and the government's overall budget. [para. 100]

A concurring judgment, written by Justice L'Heureux-Dubé, with Gonthier and McLachlin JJ, found that child protection proceedings invoked not only the section 7 right to "security of the person" but also the section 7 right to "liberty." [para. 118] The concurring judgment also stated that the equality values in sections 15 and 28 of the *Charter* come into play since issues of fairness in child protection hearings also have significance for women and men from disadvantaged and vulnerable groups. [para. 115]

The implications of *G.(J.)*

Professor Gaudreault-DesBiens believes that the *G.(J.)* decision is extremely significant.

The scope of the *New Brunswick (Ministry of Health and Community Services) v. G.(J.)* decision is far-reaching. Despite the many passages where Chief Justice Lamer attempts to convince his readers that its scope is limited to the particular circumstances of the case or that its scope is in any event rather restricted, one can only be struck by the considerable extension that the court applies to the constitutional right "relative" to the services of a lawyer paid by the state, a right already hesitantly recognized in criminal proceedings.²⁸ [translation]

However, as he points out, in *G.(J.)* the Supreme Court of Canada judges were careful to ground the right to publicly-funded counsel in the particulars of the case. It was the “circumstances of this case” [para. 75] that gave rise to the need for counsel: both the mother’s personal situation (her finances, her level of education and her ability to represent herself in a complex matter) and the state action, which in this case was seen to have “a serious and profound effect on a person’s psychological integrity” [para. 60] and to be a “gross intrusion into a private and intimate sphere.” [para. 61]

Although there is no automatic entitlement to publicly-funded counsel as a result of *G.(J.)*, even in child protection cases, the case does set an important precedent, opening the door to a right to counsel in civil matters and providing guidance on the type of factors a trial judge should consider in deciding whether or not there is a right to publicly-funded counsel under section 7. Several of the opinions explore how the Supreme Court of Canada’s decision in *G.(J.)* might be used to extend the right to publicly-funded counsel in other situations.²⁹

In his essay, Mr. Arvay suggests that a claim for publicly-funded counsel should succeed when the claimant can establish three things:

- the person’s section 7 rights are in jeopardy,
- legal representation is required for the hearing to be fair, and
- government action is the reason there is a hearing.³⁰

To date, the courts have found a section 7 interest when these rights have been threatened:

- the right to make important and fundamental life choices,
- the right to choose where to establish one’s home,
- the right to nurture one’s child and make decisions on upbringing,
- the right to privacy with respect to inmate issues,
- the right to be free from physical punishment or suffering,
- the right to be free from the threat of physical punishment or suffering,
- the right to be free from impairments or risks to health,
- the right to be free from threats to psychological integrity,
- the right to be free from “overlong subjection to the vexations and vicissitudes of a pending criminal accusation,” or
- the right of control over one’s body and to choose medical treatment.³¹

If one of these rights, or any other right that can be tied to “life, liberty and security of the person,” is at risk, then the first part of the *G.(J.)* test has been met. The next step is to show that without legal representation, the proceedings will not be in accordance with the principles of fundamental justice. As Mr. Arvay explains, “Procedural fairness requires that a party have an adequate opportunity of knowing the case to be met, of answering it and putting forward the party’s own position ... [T]he ability to test evidence through skilled cross-examination is an essential aspect of a full and fair hearing, and a skill which the ordinary citizen does not possess.”³²

In *G.(J.)*, Chief Justice Lamer found that the government has an obligation under section 7 “when government action triggers a hearing.” The “state action”

element is central to the application of the *G.(J.)* ruling, but, as the court acknowledged, delineating “state action” is an “inexact science.” [para. 59] In the year 2000 Supreme Court of Canada *Blencoe* decision, Chief Justice McLachlin wrote: “Not all state interference with an individual’s psychological integrity will engage section 7.” [para. 57] The determination of what constitutes “state action,” the third step in proving the right to publicly-funded counsel in a civil matter, is likely to be the source of court cases for some time to come.

Probing the range of activities that could be included in the term “state action,” the opinions suggest that the right to publicly-funded counsel might be available in a variety of situations, not just child protection proceedings.

***Situations within the family
law sphere:***

- *an action for contact with a sibling by a sibling in state care*

As Professor Bala writes;

In situations where there is no statutory right to sibling access [when at least one of the siblings is a ward of the state], a constitutional argument can be made on behalf of a child in state care that the child’s “security of the person” (i.e. psychological well-being) requires consideration of whether it would be in the children’s best interests to have contact with each other ... If the constitutional right of a child in state care to seek a judicial order for access is to be meaningful, it should include the right to independent legal representation.³³

- *an adoption case in which the rights of a biological parent will be terminated*

Professor Bala states;

Even if an adoption does not involve a state-funded child welfare agency, the adoption will result in a court action that will permanently sever the relationship between a biological parent and the child. In effect, an adoption entails not merely adjudication of a dispute between private individuals, but also exercise of a legislative mandate for changing the status of a child. In this sense, the action of the judge in making an adoption order is a form of “state action.”³⁴

- *cases raising issues of paternity*

Again, Professor Bala speaks to this point.

It may be argued under section 7 of the *Charter* that proceedings that raise issues of paternity must be conducted in accordance with the “principles of fundamental justice.” These proceedings affect not only economic interests, but also create a profoundly important psychological bond between a parent and child that affects the “security of the person.” Further, as with adoption, the court is not merely resolving a dispute between parties, but acting as an agent of the state to permanently change the status of the relationship between a child and the putative father ... It may now be argued that reasonable efforts have to be made to identify and locate a father before an adoption is completed. There is a strong argument that under section 7 of the *Charter* an indigent litigant should have the right to have the state pay for blood tests to determine with a degree of certainty that there is (or is not) a parental relationship.³⁵

- *an action involving the Hague Convention on Civil Aspects of Child Abduction*

When a child has been brought to Canada by a parent and the other parent alleges that this action violated the custody laws of the country from which the child came, governments in Canada can be required to assist in securing the return of the child under the terms of the *Hague Convention*. In circumstances in which the parent who is bringing the child to Canada is, for example, an indigent mother fleeing an abusive relationship, Professor Bala suggests that there is a strong case to be made for publicly-funded counsel for the mother, given the state involvement in the custody dispute.³⁶

- *cases of domestic violence*

Professor Mossman cites an Ontario report which argued that “the need for counsel provided by the state is greater in cases of abuse and violence in family proceedings because the failure to provide representation may permit continuation of the abuse and violence.”³⁷ When a victim of domestic violence seeks civil remedies, such as a restraining order, for protection, Professor Bala suggests that it may be argued that “in this particularly perilous circumstance, the state’s failure to provide needed assistance to secure a statutory right is a form of state action.”³⁸

- *cases when the enforcement of a support order could result in imprisonment*

Although the courts have not seen the economic interests at stake in separation and divorce proceedings as giving rise to a section 7 complaint, there is a possibility that an indigent debtor who may face time

in prison for being in contempt of court on a support order could be found to have a right to publicly-funded representation. However, this would only be the case, according to Professor Bala, if the issues are complex and go beyond the debtor explaining straightforward financial circumstances, such as unemployment.³⁹

Other situations:

- *committal or non-consensual administration of treatment in mental health law cases*⁴⁰
- *deportation and refugee status hearings in immigration law*

Professor McCallum believes that “immigration inquiries that might lead to deportation, especially where there is cogent evidence that his or her life or liberty is in danger in the home state” show promise for extending the ruling in *G.(J.)*.⁴¹

- *disciplinary actions and parole board hearings for prisoners*⁴²
- *a case involving a witness who is forced to testify or disclose documents or to give self-incriminating evidence*⁴³
- *income assistance proceedings and appeals against termination of social welfare benefits*

Mr. Arvay refers to comments in Supreme Court of Canada decisions that did not form part of the decision (*obiter dicta*) but nevertheless suggest a possible extension of the right to counsel in income assistance proceedings.⁴⁴

- *expropriation proceedings*

- *applications to evict tenants from public housing*
- *cases involving the economic capacity to satisfy basic human needs*

Professor Mossman notes that in a 1983 article, John Whyte suggested that “security of the person” should be interpreted to include “claims about being removed from a welfare programme, being subjected to the confiscation of tools essential to one’s work, or having a license cancelled when it is essential to the pursuit of one’s occupation.” She adds, however, that Professor Hogg rejected this analysis as incompatible with the placement of section 7 within the “legal rights” in the *Charter*. On the other hand, Mr. Arvay refers to comments in Supreme Court of Canada decisions that did not form part of the decision (*obiter dicta*) but nevertheless suggest that the economic capacity to satisfy basic human needs may also be protected by section 7.⁴⁵

The authors therefore see the possibility of using the ruling in *G.(J.)* to argue for publicly-funded representation for indigent people in a variety of situations. Mr. Arvay concludes;

In my opinion, section 7 provides strong grounds for an argument for a constitutional right to legal aid in a wide range of government-initiated processes where it can reasonably be argued that the life, liberty or security of the person is potentially threatened. A right to counsel will arise wherever the interests at stake in the hearing are significant and particularly where the government is represented by counsel.⁴⁶

Professor Gaudreault-DesBiens’ interpretation of *G.(J.)* is narrower, “[t]he most plausible interpretation, and even the most probable one...is that the state should not only be party to the proceedings but should also be at their origin.”⁴⁷
[translation]

The section 7 right to “liberty”

For Professor Mossman, a noteworthy aspect of the concurring judgment in *G.(J.)* is its finding that the case raised the liberty interest in section 7. This finding followed the reasoning in the dissenting judgment of the New Brunswick Court of Appeal in the case, in which the dissenting judges, Bastarache and Ryan J.J. stated that the liberty right extended beyond criminal law and questions of physical liberty. The meaning of the right to liberty remains unsettled but Professor Mossman believes that *G.(J.)* “expanded the scope of “liberty” even though it remains difficult to articulate it precisely.”⁴⁸

Expanding the scope of the “liberty” interest is important because, in analysis of the *Charter*, “liberty” has been interpreted as covering a broader range of situations than has “security” of the person.⁴⁹ This creates the opportunity for more individual cases to qualify for section 7 protection, based on *G.(J.)*.

The limitations of *G.(J.)*

It is clear that the reasoning in *G.(J.)* covers civil cases involving “state action,” whatever that comes to mean, but does it extend to cover cases involving private parties only?

The first obstacle is that the *Charter* has not historically been applied to private activity, as reflected in the 1986 case

Retail, Wholesale and Department Store Union v. Dolphin Delivery and illustrated by this quote from *McKinney v. University of Guelph*: “The *Charter* is essentially an instrument for checking the powers of government over the individual ... To open all private and public action to judicial review could strangle the operation of society and ... could easily interfere with freedom of contract.”⁵⁰

In fact, the courts have not been inclined to order publicly-funded counsel in divorce proceedings.⁵¹ The ruling in *Miltenberger v. Braaten* is representative: “Here there is no state action which threatens the security of the respondent’s person. This is a court action between private citizens to determine the custody of their children.” The case proceeded without publicly-funded representation being made available to the respondent.⁵²

Interestingly, Professor Bala notes that a case similar to *G.(J.)* was decided by the United States Supreme Court twenty years ago and warns that the result has not been to significantly extend constitutional rights to representation in family law proceedings in that country.⁵³

Although the application of *G.(J.)* to civil law matters between private parties is doubtful, it is perhaps not impossible. Professor Roach argues that “civil litigation between private parties implicates the state which requires the parties to respond to pleadings and may play a role in the enforcement and execution of judgments” admitting, however, that “civil litigation [between private parties does] not seem to be the type of state action contemplated in *G.(J.)*.”⁵⁴ Professor Mossman refers to an article by David Dyzenhaus in which he argues that “security of the person” may

be affected by a disparity of power that has to be taken into account regardless of the source of the disparity: state or private action. Following that approach, disparate resources between men and women in family law matters could raise a section 7 interest and require publicly-funded counsel if the disparity precludes a fair trial.⁵⁵

Professor Bala suggests that publicly-funded representation should be available to children in child protection cases where decisions are being made about their future care and custody and they are old enough to understand the purpose of the proceedings. *G.(J.)* recognizes that children have their own constitutional right to “liberty and security of the person” and Professor Bala sees the link to decisions in American courts: “Although a child’s rights and interests are not the same as those of an adult, some American decisions have recognized that when a child is “old enough to understand the nature of the guardianship proceeding and its effect on him, to have formed considered views about it, and to express those views,” then “due process” requires that the child “be given the opportunity to be heard in a meaningful way.”⁵⁶ If a child has a position that differs from the parents or an agency, “there may be a constitutional right to independent counsel to advance that view.”⁵⁷ Building on the recognition of a right to publicly-funded counsel for children in some child protection cases, there may be a possibility for the recognition of a right to publicly-funded counsel for children in some private family law proceedings.

G.(J.) opens the door to a right to publicly-funded counsel in civil law cases but the requirement of “state action” to “trigger” the right means that it is unlikely that

“purely private disputes” such as a divorce proceeding will give rise to a section 7 violation and the need for publicly-funded representation to ensure that the principles of fundamental justice are observed.

**The denial of legal aid:
“state action” and therefore
a section 7 violation?**

Two authors suggest that the denial of legal aid itself could be seen as a state action that permits the application of *G.(J.)*. Professor McCallum refers to Justice Wilson’s decision in the *Morgentaler* case which confirmed the right to make personal decisions of fundamental importance free from state-induced psychological stress. Professor McCallum concludes, “Denial of state-funded legal aid, or uncertainty as to whether an applicant will qualify for legal aid, is state-induced psychological stress that may violate the *Charter*.”⁵⁸

For Professor Lamarche a denial of legal aid may be a violation of a person’s fundamental rights if, as a result, the person cannot get to court. She questions the legality of legal aid plans that automatically exclude certain categories of legal services and argues that a legal aid plan must look at the physical and psychological security of the applicant in making its service decisions and decide on coverage accordingly.

It is rather the very recognition of the vulnerability of citizens deprived of legal aid by the legislation in force that must be emphasized here...The enabling legislation in the matter of legal aid cannot automatically exclude certain categories of legal services. In order to ensure the availability of legal aid in cases where the problem assumes the nature of litigation likely to prejudice the physical or psychological security of an individual or a family, the enabling legislation should provide for an administrative review of all requests for legal aid, independently of the category of legal services with which this demand has been historically associated. Every decision on the issuing of a legal aid mandate or certificate should be subject to independent administrative review and the law should explicitly allow, as a reason for review, consideration of the prejudices to the physical and psychological security of the applicant and his/her family that would flow from a refusal to grant legal aid.⁵⁹
[translation]

The failure to do this is a violation of *Charter* rights.

The section 15 argument that legal aid plans must maximize parity or equity between resources spent on criminal and civil legal aid and between resources spent on men and women will be discussed later.⁶⁰

Part 4 – Other Arguments to Expand the Right to Publicly-Funded Legal Representation

Section 15 arguments

In Law v. Canada (Minister of Employment and Immigration), the

Supreme Court of Canada unanimously adopted a three-part guideline to use in section 15 situations: (1) there must be differential treatment between a claimant and others; (2) the treatment must be based on enumerated or analogous grounds; and (3) the challenged law must have a discriminatory purpose or effect. The court found that the promotion of human dignity is a part of the examination of discrimination under section 15.

.. [H]uman dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits.⁶¹

Five authors examine in some detail the possibilities of a court accepting a right to civil legal aid based on a section 15 equality argument.⁶² The case can be built on discrimination based on the enumerated grounds: sex, national or ethnic origin, or mental or physical disability or on analogous grounds: province of residence or poverty.

Discrimination based on sex or another ground enumerated in section 15

“[A]lthough the legal aid programmes do not explicitly deny legal aid coverage to women, they may be held to violate women’s equality if there is sufficient empirical evidence that they significantly disadvantage women as compared to men,” writes Professor McCallum, citing previous work by both Dean Hughes and Professor Mossman.⁶³ The gender-based discrimination argument uses the statistics that more men than women are charged

with criminal offences and the reflection that women are more likely than men to require legal services for family law matters. If the legal aid system is not equally available to women and men then the two sexes do not enjoy equal access to the justice system or “equal benefit of the law.”

Dean Hughes suggests an “intra-plan comparison,” comparing the “usage of [a plan] on the basis of sex and national origin, disability or other relevant grounds, the resources given to criminal and civil law matters under the [plan] and the significance of the interests guaranteed by section 7 of the *Charter*.” This information could be used for an argument that a particular province’s plan contravenes section 15 because it offers more coverage to criminal rather than civil, including family, law matters or that it discriminates on the basis of ethnic origin, nationality or disability by failing to offer coverage to certain types of cases (for example, immigration matters or rental disputes in public housing).⁶⁴

Discrimination based on province of residence

Comparing the legal aid plans across Canada, an “inter-plan comparison”⁶⁵ would contrast the broader coverage available in some provinces with narrower coverage available in others.

The difference in coverage of legal aid programmes across the country means that individuals living in different parts of the country have different access to legal aid, and thus are denied equal access to the benefits and protections of the law ... [although providing legal aid is a provincial rather than a federal constitutional matter (administration of justice power)] the lack of national

standards for federally-funded programmes, including social programmes funded through the [Canada Health and Social Transfer], may violate section 15 equality rights, and particularly the right to the equal benefit of section 36 of the *Constitution Act, 1982* which states the commitment of the federal and provincial governments to promoting, *inter alia*, equal opportunities for the well-being of Canadians, and to providing essential public services of reasonable quality to all Canadians.⁶⁶

However, inequality generated by the differences in coverage in different provincial legal aid plans is a “province of residence” argument and “province of residence” is not an enumerated ground in section 15. The Supreme Court of Canada has said that it does not consider “province of residence” to be an analogous section 15 ground although it did find that “aboriginality-residence” is a protected ground in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*.⁶⁷ The inter-plan inequality argument, in the words of Professor McCallum “is likely to be more efficacious in lobbying rather than in litigation, especially if supported with references to the poor reports Canada has been getting recently from international human rights monitoring agencies.”⁶⁸

Discrimination based on poverty

Professor McCallum considers that “[r]ecognizing poverty as an analogous ground would conform with the values of self-respect and self-worth that the Supreme Court has said are to be protected by section 15” but she writes “judges are unwilling to find that poverty is an analogous ground” because the poor are a “disparate and heterogeneous group” rather than a “discrete and insular minority.”⁶⁹ She believes that even if

poverty were an analogous ground, it might be difficult to characterize legal aid plan restrictions on eligibility as restrictions based on an applicant’s irrelevant personal characteristics since, despite the fact that legal aid is not available to everyone, legal aid applicants are all treated in the same way. She suggests that an opening to this “analytical impasse” may have been created by the Supreme Court of Canada decision in *Eldridge v. British Columbia (Attorney-General)*. The case concerns the provincial government’s failure to fund sign language interpreters for people who are deaf and need to use medical services. This was found to be a violation of the rights of people who are deaf because in the words of Professor McCallum;

[e]ven though the state had no constitutional obligation to provide medical services, once it did so, it had to ensure that deaf people received the same level of medical care as the hearing population ... This obligation to take positive action to extend the scope of a benefit to previously excluded classes of persons should apply as well to compel the government to make legal aid available so that the poor can access the courts and enforce rights and remedies provided by law.⁷⁰

Mr. Arvay’s opinion offers a step-by-step analysis of how to argue that poverty is an analogous section 15 ground and then make the case for expanded legal aid services using the *Law* guidelines. He notes that the classification of poverty as an analogous ground is still being debated and has not yet been addressed by the Supreme Court of Canada.⁷¹ Mr. Arvay refers to *R. v. Banks* in which the defendants argued that Ontario’s new anti-panhandling/anti-squeegee law discriminated against them because of

their “extreme poverty.” The court did not base its decision on the poverty issue but did say “while the weight of authority is against recognizing poverty in itself as an analogous ground, the issue cannot be said to be finally settled.”⁷² When granting leave to appeal in the *Polewsky v. Home Hardware Stores Ltd.* case, Misener J. found that “a very good argument can be made” that poverty is an analogous ground.⁷³

Mr. Arvay also refers to *Corbiere v. Canada* where the Supreme Court of Canada defined an analogous ground as “constructively immutable” -- a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. He, therefore, concludes;

In my opinion it is arguable that in our society poverty is generally not something that an individual can change of his or her own accord. There is ample research to support the proposition that it is the Canadian social and economic system that keeps many individuals in a state of poverty, not a lack of personal initiative on the part of the individuals. It could be argued that by “immutable” and “constructively immutable,” the Supreme Court of Canada must have meant that the characteristic is beyond the individual’s *own present capacity* to change, and that poverty is such a characteristic.⁷⁴

If poverty is an analogous ground under section 15, this would meet one of the three elements for proving a section 15 violation set by the Supreme Court of Canada in the guidelines in the *Law* case.

Looking to the issue of differential treatment, Mr. Arvay writes;

In a situation where:

- the government denies a benefit provided under law (for instance, denial of Employment Insurance benefits), or otherwise takes action that may not in itself engage section 7 *Charter* rights,
- a person who wishes to challenge the law or action and could afford legal counsel would be in an advantageous position compared to a person who cannot afford legal counsel, and
- any available legal aid program does not provide legal aid in the circumstances,

it could be argued that the laws in question fail to take into account the claimant’s already disadvantaged position within Canadian society, resulting in substantively differential treatment between the claimant and others on the basis of the personal characteristic of poverty. The differential treatment arises from the *combined* effect of an “underinclusive” legal aid statute and the statute under which the government action or benefit is authorized.⁷⁵

The third element in the *Law* guidelines is a finding of discrimination in a substantive sense; differential treatment that is inconsistent with the purposes of section 15. Mr. Arvay considers cases that concern “equal benefit of the law” and the “contextual factors” that can be applied to determine if a situation is “demeaning to the dignity” of a particular group.⁷⁶

He concludes;

In my opinion, a constitutional right to legal aid will arise in a range of proceedings where the government takes action or denies a benefit provided under law. Where a person who cannot afford counsel to challenge the action or law would be at a disadvantage compared with a

person who can afford counsel, differential treatment results. In my opinion there are reasonable grounds to argue that this differential treatment is based on an analogous ground for the purposes of section 15: poverty. Finally, the contextual analysis strongly supports the conclusion that failure to provide legal aid violates the dignity of individuals living in poverty, as they suffer a pre-existing disadvantage, their needs are not recognized or accommodated, and the nature of the interests thereby affected, including their right of access to the courts, are significant.⁷⁷

***Charter* challenges and the right to publicly-funded legal representation**

When an indigent individual raises a *Charter* challenge concerning either a criminal or civil law matter, Mr. Arvay contends that the state has an obligation to provide the person with counsel.

The ability to apply to a court for a constitutional remedy is fundamentally a protection or benefit of the law to which all individuals should be entitled, without regard for their financial status. As representation by counsel is crucial to the effectiveness of an individual's application under section 24(1), the values contained in section 15 of the *Charter* must require that an indigent person be provided with counsel to assist in the vindication of his or her rights.⁷⁸

Mr. Arvay's opinion reviews the case law that led him to this conclusion.

In *John Carten Personal Law Corp. v. British Columbia (Attorney General)*, the applicant questioned the constitutionality of a provincial act which imposed a tax on legal services, in part because the law interfered with the public's right to access

the courts. The majority found no proof that the tax prevented people or a class of people from exercising their legal rights but the Chief Justice dissented.

McEachern, C.J.B.C. stated;

This appeal, however, raises more than just a question of physical access to the courts. The doors of the court houses of the nation are always open and anyone may represent him or herself in litigation. The context of *Charter* litigation, however, persuades me that the *Charter* guarantees much more. Physical or *de facto* access is surely not enough. To withstand *Charter* scrutiny, access to the courts of justice must be effective access, which in practical terms means access to counsel ... *Charter* litigation should not be the exclusive preserve of the wealthy or the well funded.

Although McEachern, C.J. was in dissent in the case, as Mr. Arvay points out, the majority did not disagree with him on the statements of principle.⁷⁹

Mr. Arvay reflects on "other cases in which the courts have acknowledged that individual litigants should not bear the costs of *Charter* litigation because of the important public interest in the determination of constitutional issues." Noting that courts have awarded costs to an unsuccessful or only partially successful plaintiff against the successful Crown, Mr. Arvay concludes;

It follows that if the court is willing to award costs at the *end* of a proceeding to a litigant who raises a serious constitutional question whether or not they are unsuccessful at trial, the court may be willing to order that funding should be provided at the *outset*. The importance of the issues, the public interest in having the issues determined, the difficulty of the case, and the financial consequences for the

plaintiffs can all be determined before the proceedings begin.⁸⁰

Both Mr. Arvay and Professor McCallum refer to the 2001, *Spracklin v. Kichton* decision of the Alberta Court of Queen's Bench. In this case, the court "required Alberta to provide counsel for Spracklin in relation to her need for representation on the subject of the constitutional challenge" which concerned the definition of spouse in family property legislation that excluded people who were not legally married. The Crown had intervened in the case to defend the legislation and Ms. Spracklin argued that she did not have the financial resources to answer the case that the Alberta government, with its resources, could make and that she would therefore be denied her right to full benefit of the law.⁸¹

Professor McCallum writes, "Recent lower court decisions ... suggest that judges may be willing to require the Crown to pay for counsel for individuals who are raising valid constitutional questions that affect them directly and will have substantial and wide-ranging implications for others." Both authors agree that there is a strong argument for a right to publicly-funded counsel when a plaintiff with limited financial means raises a *Charter* challenge.⁸²

Professor Gaudreault-DesBiens looks at the issue from a philosophical perspective. Is it acceptable in a free and democratic society, he asks, for a person with a complaint about discrimination to be unable to bring that complaint to the courts?

We would find it hard to tolerate that the potential victim of a discrimination prohibited by section 15 would be condemned to helplessness before the

law by virtue of lack of financial resources and, where such is the case, ineligibility for legal aid. To all practical purposes it would be rather like consigning that person and the group to which he/she belongs to the permanent status of discriminated minority. But is that acceptable in a free and democratic society?
[translation]

Professor Gaudreault-DesBiens recommends that the subject receive more thought.⁸³

The right to publicly-funded legal representation based on constitutional principles

Dean Hughes suggests taking a new approach to the issue of the right to publicly-funded legal representation;

employing foundational constitutional principles [that] could allow the court a fresh basis for finding a constitutionally entrenched right to legal aid or ... at least a more broadly and systematically established right to publicly-funded counsel in appropriate cases ... These principles include basic constitutional concepts such as democracy, federalism, the rule of law, judicial independence, respect for minority interests, full faith and credit and constitutionalism itself.⁸⁴

Dean Hughes devotes several pages of her opinion to mapping out this new approach. First, one needs to establish that meaningful access to the legal system is a constitutional value. The Supreme Court of Canada decision in the *B.C.G.E.U. v. British Columbia (Attorney-General)* is pertinent. The case dealt with picketing of courthouses in British Columbia and Dickson C.J. wrote;

It would be inconceivable that Parliament and the provinces should

describe in such detail the rights and freedoms guaranteed by the *Charter* and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court ... There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.⁸⁵

Dean Hughes points out that the rule of law incorporates *Charter* values and as such continues to evolve. She also notes that the application of the rule of law and fundamental constitutional principles is not limited to criminal law cases or civil law cases involving state action.

The ramifications of civil disputes often have serious implications for the physical and psychological integrity of the parties. In family cases, for example, the development of the law which is the result of both statute (government action) and judicial interpretation means that the economic security of a separated spouse or the degree to which a parent has a relationship with a child may well rely on the individual's capacity to prepare an adequate case and represent her or himself in court ... [I]nterests which arise in the private sphere may be as serious [as the consequences of conviction in the criminal law sphere].⁸⁶

Dean Hughes also examines the objections that are likely to be made to her proposed approach. These include the courts' reluctance to apply constitutional obligations to private disputes; their reluctance to impose financial obligations on governments; their reluctance to recognize economic status as the basis for granting rights; the ambiguous legal status of the fundamental constitutional principles; and the need to show a nexus

between private disputes and government. On this latter point, Dean Hughes interprets the ruling in *Eldridge v. British Columbia (Attorney General)* to mean that the *Charter* not only applies to government and to entities that "look like" government but also to entities which are carrying out government policy. Hence, the privatization of a government service, such as providing housing to people who are disabled, may not allow the non-government landlord to escape the values found in the *Charter*.⁸⁷

As for the courts' reluctance to impose financial obligations on government, Dean Hughes notes that in *G.(J.)* the Supreme Court of Canada found the cost of providing publicly-funded legal representation to the mother were minimal and that her right to a fair hearing "outweighs the relatively modest sums ... at issue in this appeal."⁸⁸ However, Dean Hughes admits that the courts resist intruding into decisions about public spending priorities and suggests that it may be worthwhile to gather information on the costs of *not* providing legal representation to indigent parties and information to show that providing legal representation may not be as costly as governments claim.⁸⁹

Dean Hughes expresses doubts about the possibilities of expanding the right to publicly-funded legal representation to private disputes based on the current case law and concludes that "it is only through a new approach that such a right can be established."⁹⁰

Canada's international obligations

Professor Lamarche reviews international programs and reports, noting various commitments to ensure security of the

person and the right to representation,⁹¹ equality for women and children and access to justice,⁹² the need for an accessible system of justice to make human rights meaningful,⁹³ and, strategies to reduce poverty, which include strategies to provide access to justice.⁹⁴ She argues that the right to security of the person in Canada must be interpreted in the light of Canada's international commitments, as well.

The theory of international human rights law has recognized the need to provide, on a national scale, the availability of useful recourse in order to guarantee the respect of each human

right whether belonging to the domain of *jus cogens*,⁹⁵ or for which a state is bound by treaty. Canada has ratified the instruments of the *Charter of Human Rights*, the *Convention for the Elimination of All Forms of Violence Against Women* and the *Convention on the Rights of the Child*. Not to go further than just this list of instruments, which are recognized as fundamental, it is clear that the indivisibility of the relation that ties them together leads to the conclusion that all the essential aspects of human security benefit from guarantees created by Canada's international undertakings.⁹⁶
[translation]

Part 5 – Actions to Take

A call to lawyers

The eight opinions set out a variety of legal arguments that litigators can use to try to secure publicly-funded legal representation for individuals. Ironically, litigators acting in these situations will likely be acting for free (*pro bono*) as their clients, by definition, do not have the means to pay legal counsel. It is important for the good of all to work for an expanded right to publicly-funded legal representation which can be won on a case-by-case basis, when the right fact situation will bring the *Charter* and constitutional arguments clearly into focus, as was the case in *G.(J.)*.

Given the price that society pays when there is not true access to justice for all citizens, it is incumbent on lawyers to be on the alert for cases in which the lack of legal representation is a violation of section 7, subsection 10(b), subsection 11(d) or section 15 rights and the

principles of fundamental justice. The most vulnerable in our society need advocates to ensure that they are not denied the opportunity to exercise their rights, including the right to equal protection and equal benefit of the law.

The role of judges

Judges have a duty to conduct a fair trial, to uphold the principles of the constitution and the *Charter*, and to fulfill their role as “guardians of the rule of law”⁹⁷ and guardians of those with special needs (particularly children).⁹⁸ On rare occasions, judges have used their *parens patriae* power to order publicly-funded counsel for a parent or child. For example, in *N.(I.) v. Newfoundland (Legal Aid Commission)*, the court made an order for publicly-funded counsel for an indigent biological mother who was challenging the validity of an order for the adoption of her

children by the foster parents with whom they had been placed.⁹⁹

In *G.(J.)*, the Supreme Court of Canada identified a trial judge’s responsibility to ensure a fair trial and to require the appointment of publicly-funded counsel if necessary. [para. 103 and 104] In keeping with this reasoning, the concurring judgment said “that it is the obligation of the trial judge to exercise his or her discretion in determining when a lack of counsel will interfere with the ability of the parent to present his or her case.” [para. 119]¹⁰⁰

It is to be hoped that judges will continue to be vigilant concerning the needs of unrepresented parties and to stay proceedings or order the appointment of publicly-funded counsel if necessary to guarantee them a fair trial.

The need to work for changes to laws and policies

“[It is] difficult to draw a clear or bright line about when the *Charter* requires legal aid” notes Professor Roach,¹⁰¹ highlighting the ambiguities in the current state of the issue. Without a clear or bright line, court cases to explore just where the line should be drawn are inevitable, thus leaving it to indigent accused in criminal cases and indigent parties in civil cases, who for whatever reasons do not qualify for legal aid, to fend for themselves.

Professor Mossman observes that it is becoming more and more difficult for unrepresented parties to manage their way through our justice system: “[T]he increasing complexity of law and legal regulation represents a significant factor to

be considered in determining whether societal changes require a response that fosters more effective access to legal advice and assistance, including a constitutional right to state-funded counsel for a wide variety of civil matters.”¹⁰² She quotes from an article by Dean Hughes, which makes the case for a systemic response to a systemic problem. “Once lack of access is seen as a systemic “problem,” it is more likely that it will be understood that it requires a systemic solution. This does not automatically mean a particular form of legal aid, but legal access programs which deliver a variety of services as appropriate.”¹⁰³

Part of the solution, for Professor Bala, is an expansion of the legal aid program in family law matters. “It would be preferable if those responsible for legal aid ensured that adequate resources are available to ensure that justice is done in family law proceedings, rather than forcing those who are among the most vulnerable in our society to try to secure the right to legal representation through the courts.”¹⁰⁴

There is a clear need for changes in laws and policies to provide the most vulnerable in our society with better access to justice. For Professor Gaudreault-DesBiens the consequences of not acting, of failing to provide publicly-funded legal representation to those who need it most, are significant – a mistrust of the judicial system and the administration of justice leading to a lack of belief in the rule of law and, ultimately, in the worst case, a decision to take justice into one’s own hands.¹⁰⁵

Imagine how those brought to trial without representation by a lawyer could come to perceive the legal system. Such persons would be more

likely to be disappointed by the outcome of a trial than others who would have been represented, since their evaluation of that outcome would always be made in the light of their initial dissatisfaction with the *uncorrected* imbalance in the ratio of power between the parties. There is no doubt that this could contribute to the creation of a climate of mistrust towards the judicial system and the administration of justice generally, undermining the effectiveness and

even the legitimacy of the principle of the primacy of law. In the same way, and assuming the worst case, there might even be the danger that the person appearing would be sufficiently frustrated to take justice into his own hands.¹⁰⁶ [translation]

Can we afford to pay this price? The need for continued and strengthened efforts to improve access to legal representation is evident.

Part 6 – Conclusion

The right to publicly-funded legal representation is an evolving area of law. In spite of the failure of the framers of the *Charter* to include the right in the *Charter*, the courts are recognizing that, in a free and democratic country, publicly-funded legal representation may be necessary in both criminal and civil law cases to ensure that the principles of fundamental justice are respected. The judgment is made on a case-by-case basis.

The authors have shown that there are sound legal arguments to use to enlarge the range of cases in which publicly-funded legal representation must be available to an indigent individual and to use to argue for expanded legal aid services in general. As litigators, lawyers and policy makers continue to explore how to expand the right to publicly-funded representation, it is hoped that our lowest income citizens will soon be able to enjoy improved access to the courts and to justice.

Obviously, a summary of this sort cannot do justice to the depth of analysis in the opinions themselves. Please read the opinions for a full appreciation of how the

authors argue that the right to publicly-funded legal representation can be expanded in Canada.

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- R. v. Rain*, [1998] A.J. No. 1059 (Alta. C. A., leave to appeal denied).
- R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1.
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- Re Ewing and Kearney and the Queen* (1974), 49 D.L.R. (3d) 619 (B.C.C.A.).
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- Spracklin v. Kichton*, [2001] 203 D.L.R. (4th) 22 (Alta. Q.B.).
- Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385.
- United States of America v. Akrami*, [2001] B.C.J. No. 174 (B.C.S.C.).

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M.J. Mossman, “Gender Equality and Legal Aid services: a Research Agenda for Institutional Change” (1993) 15 Sydney Law Review 30.

John Whyte, “Fundamental Justice” (1983) 13 Manitoba Law Journal 455.

ENDNOTES

- ¹ Young people charged with criminal offences have a right to counsel through statute provisions. See *Young Offenders Act*, R.S.C. 1985, c.Y-1, as amended, subsection 11(4) which requires the youth justice court to refer an unrepresented young person to legal aid or direct that the young person be represented by counsel if the young person requests legal representation and legal aid is not available.
- ² See *R. v. Brydges*, [1990] 1 S.C.R. 190.
- ³ The opinions of Dean Hughes and Professors Gaudreault-DesBiens, McCallum and Roach speak to this point.
- ⁴ [1994] 3 S.C.R. 236 at 287.
- ⁵ Page 136, Professor McCallum.
- ⁶ Sections 684(1) and 694.1, *Criminal Code* give the Court of Appeal and the Supreme Court of Canada or a judge of those courts the authority to order legal assistance for an accused who cannot afford a lawyer. Courts have also interpreted section 7 of the *Charter* to give judges the discretion to order publicly-funded lawyers to assist an accused where necessary to ensure a fair trial. This latter point is discussed in more detail later in this summary.
- ⁷ Pages 99 to 102, Dean Hughes.

- ⁸ Pages 115 to 118, Professor Lamarche's opinion provides a brief review of the different approaches to legal aid coverage in the provinces.
- ⁹ *Charter* rights are not absolute and can be limited by laws that can be defended as "justified in a free and democratic society." Section 1, *Charter*: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
- ¹⁰ Section 7, *Charter*: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
- ¹¹ Subsection 11(d), *Charter*: "Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."
- ¹² Section 15, *Charter*: (1) "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." (2) "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."
- ¹³ Subsection 24(1), *Charter*: "Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."
- ¹⁴ "In some cases, the court will raise the issue of representation on its own (*proprio motu*). Indeed, if a judge believes that the *Charter* requires representation for an unrepresented individual, it would seem that the judge has a duty to raise this question, and ask that those involved in the case address the issue." *R. v. McKibbin*, page 60, Professor Bala; Page 190, Professor Roach.
- ¹⁵ In a Newfoundland case, *R. v. D.P.F.*, the judge declined to use the *Charter* as reason to require that the accused be represented by counsel and instead relied on his common law duty to ensure that a trial is conducted in a manner that is in the interests of justice. Footnote 22, Professor McCallum.
- ¹⁶ *Re White and the Queen*; *Re Ewing and Kearney and the Queen*; Pages 99 to 102, Dean Hughes; Footnotes 5 & 6, Professor Mossman; Footnote 7, Professor Roach.
- ¹⁷ *R. v. Rowbotham*, page 69; See also page 87 to 88, Professor Gaudreault-DesBiens.
- ¹⁸ See endnote 6.
- ¹⁹ Page 189, Professor Roach.
- ²⁰ Page 136, Professor McCallum.
- ²¹ *Rowbotham*, page 35; Page 87, Professor Gaudreault-DesBiens; Page 136, Professor McCallum.

- 22 Page 137, Professor McCallum.
- 23 Page 137, Professor McCallum.
- 24 *R. v. Magda*, [2001] O.J. No. 1861.
- 25 “[T]he issue of incarceration is significant but not determinative of the issue ... To decide otherwise would be to conclude that whenever an accused was not facing jail, a court could never rule that the fairness of the trial was affected should the trial proceed without counsel.” *R. v. Hill*, footnote 18, Professor McCallum.
- 26 Footnote 11 in Professor McCallum’s opinion lists several cases where the courts have considered whether or not the principles of fundamental justice require an accused to be represented by counsel.
- 27 Footnote 20, Professor McCallum.
- 28 Page 90, Professor Gaudreault-DesBiens.
- 29 In particular, see the opinions of Mr. Arvay, and Professors Bala and Mossman.
- 30 Page 37, Mr. Arvay.
- 31 Footnote 6, Mr. Arvay.
- 32 Page 38, Mr. Arvay, citing *Thomson v. Canada (Deputy Minister of Agriculture)*.
- 33 Page 67, Professor Bala.
- 34 Page 69, Professor Bala.
- 35 Page 71, Professor Bala.
- 36 Page 74, Professor Bala.
- 37 Page 158, Professor Mossman citing “Case Study on the Provision of Legal Aid: Family Law,” Brenda Cossman and Carol Rogerson, *Ontario Legal Aid Review*. Professor Mossman also quotes Professor Bala: “Bala suggested that a claim for state-funded counsel will be stronger “if there are allegations of physical or sexual violence against a spouse” or allegations of child abuse, since both of these situations may engage the section 7 interest in “security of the person.” Nicholas Bala, “The *Charter of Rights* and Family Law in Canada: A New Era” (2000) 18 *Canadian Family Law Quarterly* 373 at 425.
- 38 Page 76, Professor Bala.
- 39 Page 78, Professor Bala.
- 40 Page 159, Professor Mossman, referring to “The Legal and Constitutional Requirements for Legal Aid,” Nathalie Des Rosiers, *Ontario Legal Aid Review*; Page 143, Professor McCallum.
- 41 See footnote 41, Professor McCallum.

- 42 Footnote 39, Professor McCallum referring to *Winters v. Legal Services Society*.
- 43 See footnote 35, Professor Mossman.
- 44 Page 38, Mr. Arvay; Page 143, Professor McCallum.
- 45 Page 160, Professor Mossman, citing John Whyte, "Fundamental Justice" (1983) 13 Manitoba Law Journal 455; Peter Hogg, *Constitutional Law of Canada*, looseleaf 4th ed. (Scarborough: Carswell, 1997) at section 44.8; Page 38 and footnote 7, Mr. Arvay, citing *Singh v. Canada (Minister of Employment and Immigration)* at 207 and *Irwin Toy v. Québec*, at 1003.
- 46 Page 39, Mr. Arvay.
- 47 Page 94, Professor Gaudreault-DesBiens.
- 48 Page 163, Professor Mossman.
- 49 In *R. v. Parker*, for example, the right to "liberty" included the right to make decisions of fundamental personal importance including the right to smoke marijuana to alleviate the life-threatening effects of epilepsy, page 163, Professor Mossman.
- 50 Footnote 26, Professor Roach, citing *McKinney v. University of Guelph* and referencing *Retail, Wholesale and Department Store Union v. Dolphin Delivery*.
- 51 Footnote 30, Professor Mossman; Page 69, Professor Bala.
- 52 *Miltenberger v. Braaten*, para. 6.
- 53 Page 58, Professor Bala, citing *Lassister v. Department of Social Services*; Footnote 62, Professor Mossman.
- 54 Page 193, Professor Roach.
- 55 Page 158, Professor Mossman, referring to David Dyzenhaus "Normative Justifications for the Provision of Legal Aid," Ontario Legal Aid Review.
- 56 Page 66, Professor Bala citing *In re Adoption No. 6Z97003 for Montgomery County*.
- 57 Page 66, Professor Bala citing *Re R.A.M.; Children's Aid Society of Winnipeg v. A.M.*. Professor Bala also points out that Article 12 of the *United Nations Convention on the Rights of the Child*, which provides that a child "shall ... be given the opportunity to be heard in any judicial ... proceedings affecting the child, either directly or through a representative," strengthens the case for publicly-funded representation for children.
- 58 Page 142, Professor McCallum.
- 59 Page 131, Professor Lamarche.
- 60 Page 102, Dean Hughes.
- 61 *Law v. Canada (Minister of Employment and Immigration)*, para. 53.

- ⁶² Mr. Arvay's opinion provides the most detailed section 15 analysis, pages 47 to 54. See also pages 102 to 105, Dean Hughes; Pages 143 to 147, Professor McCallum; Pages 169 to 172, Professor Mossman; Pages 196 and 197, Professor Roach.
- ⁶³ Page 146, Professor McCallum, citing at footnote 55, Patricia Hughes, "Domestic Legal Aid: A Claim to Equality" and M.J. Mossman, "Gender Equality and Legal Aid Services: a Research Agenda for Institutional Change."
- ⁶⁴ Page 103, Dean Hughes.
- ⁶⁵ Page 103, Dean Hughes.
- ⁶⁶ Pages 146 and 147, Professor McCallum.
- ⁶⁷ Page 103, Dean Hughes.
- ⁶⁸ Page 147 and footnote 58, Professor McCallum. Professor Lamarche's opinion covers, in some detail, the possible impact of Canada's international obligations on the right to legal aid in Canada.
- ⁶⁹ Page 144, Professor McCallum citing *Law v. Canada (Minister of Employment and Immigration)* and *Masse v. Ontario (Ministry of Community and Social Services)*, leave to appeal to the Ontario Court of Appeal and the Supreme Court of Canada denied.
- ⁷⁰ Page 145, Professor McCallum, citing *Eldridge v. British Columbia (Attorney-General)*.
- ⁷¹ Page 49, Mr. Arvay. "The Supreme Court of Canada has not yet addressed the question of whether poverty is an analogous ground under section 15 of the *Charter*, although this question may arise in *Gosselin v. Québec*, to be heard this fall [2001]."
- ⁷² Page 49, Mr. Arvay, citing *R. v. Banks*, para. 75.
- ⁷³ Page 48, Mr. Arvay, citing the leave to appeal decision in *Polwesky*, para. 11 and 18.
- ⁷⁴ Page 49 and footnote 52, Mr. Arvay.
- ⁷⁵ Page 48 and footnotes 44 and 45, citing *Polwesky v. Home Hardware Stores Ltd.* and *Vriend v. Alberta*, Mr. Arvay.
- ⁷⁶ Pages 48 to 53, Mr. Arvay.
- ⁷⁷ Page 54, Mr. Arvay.
- ⁷⁸ Pages 46 and 47, Mr. Arvay.
- ⁷⁹ Page 43, Mr. Arvay, citing *John Carten Personal Law Corp. v. British Columbia (Attorney General)*, para. 85.
- ⁸⁰ Page 44, Mr. Arvay. Mr Arvay lists six conditions that should be met for a court to find that a plaintiff bringing a *Charter* challenge is entitled to costs at the outset of a case, regardless of the outcome of the case.

- 81 Page 46, Mr. Arvay, citing *Spracklin v. Kichton*, para. 80; Footnote 4, Professor McCallum.
- 82 Page 1, Professor McCallum.
- 83 Page 98, Professor Gaudreault-DesBiens.
- 84 Page 105, Dean Hughes.
- 85 Page 106, Dean Hughes, citing *B.C.G.E.U. v. British Columbia (Attorney-General)* para. 24 and 25.
- 86 Page 107, Dean Hughes.
- 87 Page 108, Dean Hughes.
- 88 Page 109, Dean Hughes, citing the Supreme Court of Canada decision in *G.(J.)*.
- 89 Page 109, Dean Hughes, citing *Native Women's Association of Canada v. Canada* where the court overcame the reluctance to impose a financial obligation on government in order to make a right meaningful.
- 90 Page 112, Dean Hughes.
- 91 World Trade Organization, Programme focal sur la sécurité socio-économique, Page 121, Professor Lamarche.
- 92 Rapport mondial sur le développement humain du Programmes des Nations Unies pour le développement, 2002, Page 122, Professor Lamarche.
- 93 World Bank, Rapport Développement et droits de l'homme, le rôle de la Banque mondiale, Page 122, Professor Lamarche.
- 94 World Bank, Rapport sur le développement dans le monde: Combattre la pauvreté, Page 122, Professor Lamarche.
- 95 "Jus cogens" refers to immutable principles of international law. For example, Committing genocide or participating in a slave trade are violations of these fundamental principles that cannot be ignored or avoided by a state.
- 96 Page 124, Professor Lamarche.
- 97 Page 107, Dean Hughes.
- 98 Federally-appointed judges have a *parens patriae* jurisdiction, ("*parens patriae*" means literally, parent of the country), which gives them the authority to take action, such as appointing counsel or staying proceedings until counsel is appointed, to ensure that the interests of a minor or a adult who is mentally incompetent are properly represented. See footnote 10, Professor Bala.
- 99 Footnote 22, Professor Mossman.
- 100 See also footnote 7, Professor Roach.

¹⁰¹ Page 195, Professor Roach.

¹⁰² Page 178, Professor Mossman.

¹⁰³ Page 175, Professor Mossman, referring to Patricia Hughes, "New Brunswick (*Minister of Health and Community Services*) v. *G.(J.)*: En Route to More Equitable Access to the Legal System" (2000) 15 *Journal of Law and Social Policy* 93 at 113.

¹⁰⁴ Page 81, Professor Bala.

¹⁰⁵ Page 95, Professor Gaudreault-DesBiens.

¹⁰⁶ Page 95, Professor Gaudreault-DesBiens.

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Constitutional Right to Legal Aid

Joseph J. Arvay*

INTRODUCTION

This opinion will focus on the following types of proceedings in which a right to state-funded legal aid might be claimed:

- (1) civil proceedings initiated by government in which an individual's *Charter* rights are threatened;
- (2) civil proceedings commenced by an individual against the government to determine if the individual's *Charter* rights have been violated by state action.¹

For Category (1), the courts have already held that state-funded counsel will be ordered as of right if necessary for a fair hearing in accordance with section 7 of the *Charter*. Consequently, one line of argument will seek to expand the range of hearings for which fairness requires state-funded counsel.

For Category (2), an argument could be made pursuant to the principles of constitutionalism and rule of law.

A further argument based on section 15 of the *Charter* would be applicable to both types of hearings.

In the following sections I will examine the potential arguments, first in relation to proceedings initiated by government, and second in relation to proceedings commenced by the individual.

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¹ A third type of proceeding in which the right might be asserted would be civil proceedings between private citizens. While some of the arguments set out below may apply to such proceedings, we have chosen not to address civil proceedings between private citizens in this opinion.

PROCEEDINGS INITIATED BY GOVERNMENT

Section 7 of the *Charter*

Section 7 provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The analysis under section 7 is a two-step process. First, the court must determine if a person's right to life, liberty and security is in jeopardy. If this is so, then the court must identify the particular principle of fundamental justice at stake and determine whether the government has adhered to the principle.

The provision of state-funded counsel to those accused of serious crimes predates the *Charter*. In *R v. Rowbotham*,² the Supreme Court of Canada stated that the *Charter* does not *in terms* constitutionalize the right of an indigent accused to be provided with funded counsel. However, the court held that the *Charter* does guarantee an accused a fair trial in accordance with the principles of fundamental justice under subsection 7 and 11(d). Thus, there is a right to funding in certain cases not falling within provincial legal aid plans if representation is necessary for the government's actions to be in accordance with the principles of fundamental justice. Rather than obliging the government to provide state-funded counsel in all criminal cases in which the accused lacks the means to employ counsel, the court in *Rowbotham* held that a trial judge should consider factors such as the length and complexity of the case before issuing an order to stay a criminal proceeding.³

The courts have more recently recognized that section 7 can be engaged outside the criminal context. In 1999 the Supreme Court of Canada addressed the right to funding for counsel in the context of a non-criminal proceeding in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*.⁴ The Minister had taken the appellant's children into custody and was applying to extend the custody order for a further six months. The appellant had been denied legal aid funding for representation at the custody hearing.

The court in *G.(J.)* recognized that the right to state-funded counsel can extend into the civil arena. Lamer C.J.C., for the majority, stated as follows:

² (1988), 41 C.C.C. (3d) 1 (S.C.C.).

³ *Ibid.* However, the prospect of a stay has generally served as an incentive for governments to establish systematized provision of legal aid in such situations.

⁴ (1999), 177 D.L.R. (4th) 124 (S.C.C.).

When government action triggers a hearing in which the interests protected by section 7 of the Canadian *Charter of Rights and Freedoms* are engaged, it is under an obligation to do whatever is required to ensure that the hearing be fair.⁵

Thus, an individual who invokes section 7 in order to obtain state-funded counsel should succeed at least where he or she is able to establish three things:

- (a) that the individual's section 7 rights are in jeopardy;
- (b) that representation is required for the hearing to be fair; and
- (c) that government action "triggered" the hearing.

I will consider each of these elements in the next three sections.

(a) Hearings where Section 7 Rights are in Jeopardy

To date, the courts have recognized that section 7 interests may arise where the following rights are threatened:

- the right to make important and fundamental life choices,
- the right to choose where to establish one's home,
- the right to nurture one's child and make decisions on upbringing,
- the right to privacy with respect to intimate issues,
- the right to be free from physical punishment or suffering,
- the right to be free from the threat of physical punishment or suffering,
- the right to be free from impairments or risks to health,
- the right to be free from threats to psychological integrity,
- the right to be free from "overlong subjection to the vexations and vicissitudes of a pending criminal accusation," or
- the right of control over one's body and to choose medical treatment.⁶

In a proceeding where any of the above rights may be at risk, the first branch of the *G.(J.)* test will be satisfied and the question would be whether legal counsel is required for the hearing to be fair and whether government action is implicated.

Potential areas for expansion of the range of hearings in which section 7 interests may be recognized include the following:

- *Obiter dicta* in several Supreme Court of Canada decisions have suggested that the economic capacity to satisfy basic human needs may also be

⁵ *G.(J.)*, *supra* at para. 2.

⁶ See the summary of the caselaw in Chapter 44 of P. Hogg, *Constitutional Law of Canada* (Toronto : Carswell, looseleaf); see also *G.(J.)*, *supra*; and *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 46.

protected.⁷ If recognized, such protection could support an argument for the extension of a section 7 right to counsel to income assistance proceedings.

- The benefit of the rule of law itself may also be a right protected by section 7. In granting leave to appeal in *Polewsky v. Home Hardware Stores Ltd.*,⁸ Misener J. of the Ontario Superior Court of Justice stated that it was at least arguable that imposing court fees regardless of the financial resources of the applicant may violate section 7 because the fees deny all access to the courts to those who are unable to pay them, which would arguably be a deprivation of the benefit of the rule of law, “an essential component of the liberty of the subject in this Province and to the security of the person.”⁹ Such an argument could allow section 7 to provide a right to counsel in proceedings which primarily threaten constitutional rights other than “life, liberty and security of the person” (more traditionally defined) or where an individual commences a proceeding claiming his or her *Charter* rights have been violated.

(b) Representation Must be Necessary to Ensure a Fair Hearing

Once a court has determined that the interests protected by section 7 are threatened, it must then determine whether the principles of fundamental justice have been respected. At a minimum, fundamental justice includes a requirement of procedural fairness.¹⁰ Procedural fairness requires that a party have an adequate opportunity of knowing the case to be met, of answering it, and putting forward the party’s own position.¹¹

In cases dealing with complex legal issues, the presence of counsel will be necessary to achieve these the requirements of procedural fairness. For example, the ability to test evidence through skilled cross-examination is an essential aspect of a full and fair hearing, and a skill which the ordinary citizen does not possess.

(c) Involvement of Government

Lamer, C.J.’s statement that the government has an obligation under section 7 “when government action triggers a hearing” may mean only that there must be some action *of the government* that infringes the applicant’s section 7 rights for a right to state-funded counsel to arise. However, his statement also presumes that a *hearing* will be provided as a matter of procedure. His reasons do not address the situation where the government takes action contrary to an individual’s section 7

⁷ *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at 207; *Irwin Toy v. Que.*, [1989] 1 S.C.R. 927 at 1003.

⁸ [2000] O.J. No. 81 (Ont. S.C.J.), granting leave to appeal from (1999), 40 C.P.C. (4th) 330 (Ont. S.C.J.).

⁹ Paras. 14 and 15.

¹⁰ *Singh*, *supra* at para. 57.

¹¹ *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385; *Singh*, *supra* at para. 57.

rights but no hearing is provided, nor more generally where an individual commences an action against the government to determine if a *Charter* right has been violated by state action. Arguments relating to these situations are considered in a later section.

Summary of Section 7 Argument

In my opinion, section 7 provides strong grounds for an argument for a constitutional right to legal aid in a wide range of government-initiated processes where it can reasonably be argued that the life, liberty or security of the person is potentially threatened. A right to counsel will arise wherever the interests at stake in the hearing are significant and particularly where the government is represented by counsel. Consequently, it could strongly be argued that existing legal aid programs have been “constitutionalized,” and expansion of such programs constitutionally mandated, in the sense that a failure by government to provide legal aid for many types of criminal, quasi-criminal, and administrative proceedings may well result in a stay of proceedings on a case-by-case basis.

CHARTER PROCEEDINGS COMMENCED BY AN INDIVIDUAL

Constitutionalism and Rule of Law

The Principles of Constitutionalism and Rule of Law

The Supreme Court of Canada in *Reference re Secession of Québec*¹² recognized constitutionalism as one of the basic unwritten principles underlying the Canadian Constitution. Simply put, constitutionalism requires that all government action and legislation comply with the Constitution in all respects.¹³ As a fundamental principle of the Canadian legal order, the court held that constitutionalism “may in certain circumstances give rise to substantive legal obligations ... and [is] binding upon both courts and governments.”

With respect to the *Charter*, the principle of constitutionalism is given particular force through the explicit provision in section 24 of a remedy for *Charter* breaches:

24.(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

¹² [1998] 2 S.C.R. 217.

¹³ See also section 52 of the *Constitution Act, 1867*.

Constitutionalism is closely related to the principle of rule of law. The preamble to the *Charter* states as follows:

Whereas Canada is founded upon the principles that recognize the supremacy of God and the rule of law (...)

This statement expressly incorporates the principle of the rule of law into the Constitution. However, the courts have also held that this principle is an unwritten part of the Constitution because the preamble to the *Constitution Act, 1867*, indicates that Canada has “a Constitution similar in Principle to that of the United Kingdom.”

Rule of Law includes a Constitutional Right of Access to the Courts

The Supreme Court of Canada linked the concept of the rule of law to access to the courts in *B.C.G.E.U. v. British Columbia (A.G.)*.¹⁴ McEachern C.J.B.C.S.C. (as he then was) had, on his own motion and *ex parte*, issued an injunction restraining picketing of the courthouse and other activities calculated to interfere with the operations of the court. In determining that the injunction was a lawful action in accordance with the Constitution, Dickson C.J. stated for the court at paragraph 24:

The rights and freedoms are guaranteed by the *Charter* and the courts are directed to provide a remedy in the event of infringement. To paraphrase the European Court of Human Rights in *Golder v. United Kingdom* (1975), 1 E.H.R.R. 524, at p. 536, it would be inconceivable that Parliament and the provinces should describe in such detail the rights and freedoms guaranteed by the *Charter* and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. As the Court of Human Rights truly stated: “The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.” And so it is in the present case. Of what value are the rights and freedoms guaranteed by the *Charter* if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? *How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the Charter if court access is hindered, impeded or denied?* The *Charter* protections would become merely illusory, the entire *Charter* undermined.

There cannot be a rule of law without access ... [emphasis added]

From this reasoning it follows that if representation by counsel is necessary for meaningful access to the courts, then it is arguable that it must be provided to uphold the rule of law.

¹⁴ [1988] 2 S.C.R. 214.

In *Pleau v. Nova Scotia*,¹⁵ a Nova Scotia court held that court fees are constitutional only so long as they are affordable to those against whom they are levied, and struck down hearing fees on the basis that they impeded, impaired or delayed access, contrary to the principle of rule of law.¹⁶

The decision in *Pleau* was considered in *Polewsky v. Home Hardware Stores Ltd.*, *supra*. In her decision in *Polewsky*, Gillese J. rejected any suggestion that either *B.C.G.E.U.* or *Pleau* could be relied upon to support “a constitutionally guaranteed right to unimpeded access to the courts for the purposes of civil litigation,” and dismissed an application to strike down certain court fees in Ontario.¹⁷ However, the plaintiff in *Polewsky* has been granted leave to appeal the decision of Gillese J., including her dismissal of the rule of law argument.¹⁸

Access to the Courts includes Access to Counsel

In *John Carten Personal Law Corp. v. British Columbia (A.G.)*,¹⁹ the applicant challenged the constitutional validity of an *Act* that imposed a tax on legal services, in part on the basis that it interfered with, impeded or otherwise fettered the public’s right to access to the courts in a manner inconsistent with the rule of law. In the B.C. Court of Appeal, Lambert J.A., speaking for himself and Hollinrake J.A., began his analysis with the following statement:

I consider that everyone in Canada has a right to come to court and seek the help of the court in obtaining a resolution of the legal issues that have given rise to that person's problem. Everyone in Canada has a right to seek the protection of the court from any perceived oppression by the state. Everyone being prosecuted in our courts has the right to counsel and the right to make full answer and defence. And I consider that our social system and our system of government depend not only on our rights relating to dispute resolution, in courts and otherwise, but also on our rights relating to dispute prevention through a

¹⁵ *Pleau v. Nova Scotia (Supreme Court, Prothonotary)* (1998), 186 N.S.R. (2d) 1 (S.C. Chambers) at para. 104. The Federal Court Trial Division has also relied on the principle of the rule of law, to allow a waiver of court fees: *Pearson v. Canada* (2000), 195 F.T.R. 31.

¹⁶ In *Pleau*, the government argued that recourse to the courts was simply a choice a citizen makes in resolving civil disputes, and not a constitutional right. The court rejected this argument as follows:

The respondent says seeking access to the courts is a matter of choice; not necessity or compulsion. As already reviewed, we disagree. However, choice relates to how and with what assistance the citizen exercises their right of access. The choice is whether or not to retain a lawyer, not in respect to accessing the court. The latter is a fundamental right, a cornerstone of our rights in a democratic society.

An argument could forcefully be made that the court was unduly restrictive in this reasoning. The question of whether or not to retain a lawyer is, in fact, *not* a choice for those who do not have the financial resources to retain a lawyer. Consequently, while the court was right to hold that the fees were rendered invalid by the rule of law, with respect, the same principle should apply to the failure to provide funded counsel.

¹⁷ At paras. 26 to 30 in (1999), 40 C.P.C. (4th) 330 (Ont. Sup. C.J.).

¹⁸ [2000] O.J. No. 81 (Ont. Sup. C.J.).

¹⁹ (1997), 40 B.C.L.R. (3d) 181 (C.A.), leave to appeal dismissed, [1998] S.C.C.A. No. 205.

legal system which regulates succession to property, family law, and other areas of potential disharmony.²⁰

The court found a basis for these general rights both in the *Charter* and in the preamble. Indeed, the court indicated to counsel during argument of the appeal that the court were “so persuaded of the existence of those fundamental rights” that they did not need to hear argument on the English origins of the rights.²¹ However, the majority of the court declined to deal with the applicant’s arguments on these issues because of a lack of proof that “rights of access to the courts, to justice, or to legal services” had been denied due to the tax. Lambert J.A. stated as follows:

What would be required in order to find this *Act* wholly unconstitutional, or even unconstitutional in its application to a particular case, would be proof that people, or a class of people, in general, or some person in particular, who would have been able to exercise the legal rights in question if this tax were not in effect, were or was prevented by this tax from exercising those rights.²²

McEachern, C.J.B.C. (as he then was), dissenting, would have struck down the tax on the basis that it impaired violations of constitutional rights and protections, both under the rule of law and the *Charter*. He stated in part as follows:

While there is no absolute right to counsel, it is part of our legal culture that persons involved in litigation, civil or criminal, should have a lawyer. (...)

This appeal, however, raises more than just a question of physical access to the courts. The doors of the court houses of the nation are always open and anyone may represent him or herself in litigation. The context of *Charter* litigation, however, persuades me that the *Charter* guarantees much more. Physical or *de facto* access is surely not enough. To withstand *Charter* scrutiny, access to courts of justice must be effective access, which in practical terms means access to counsel.²³

McEachern, C.J.B.C. elaborated as follows:

In my view, access to counsel is essential to effective access to *Charter* rights and remedies. This can hardly be disputed and it is no answer to argue that the poorest of our citizens facing serious criminal sanction do have access to counsel and that they can by that means assert their *Charter* rights and remedies. The criteria for legal aid support continues to narrow, and most legal aid schemes do not cover at all the middle classes who can have their lives economically destroyed by a lengthy

²⁰ Para. 9.

²¹ Para. 11.

²² Para. 13.

²³ Paras. 75 and 76.

court battle. Houses must be mortgaged or sold, educations postponed, and savings exhausted to pay legal fees. Moreover, undue emphasis on the criminal law overlooks the scope and affect of the *Charter* in the lives of those who by choice or circumstances find themselves in the eye of the constitutional hurricane.²⁴

He noted that many of the rights protected by the *Charter* were not centrally engaged in the criminal context, and yet in this non-criminal area public funding for *Charter* claims was almost, if not entirely, absent.²⁵ He stated that the increasing complexity of society “makes it impossible for the overwhelming majority of our people to represent themselves in ordinary, let alone *Charter*, litigation,” and that “*Charter* litigation should not be the exclusive preserve of the wealthy or the well funded.”²⁶ He concluded that the additional burden of the tax, “by increasing the cost of litigation, impairs or hinders effective access to counsel and therefore to *Charter* rights and remedies.”²⁷

McEachern, C.J.B.C. went on to state a second reason why the tax impaired access to the courts: “the very structure of *Charter* rights and the rule of law which, by their very nature, presuppose access to counsel.”²⁸ He also noted that the substantive content of *Charter* rights is largely dictated by judicial interpretation, and thus “the legislatures intended the courts as the locus of *Charter* adjudication. They must have expected litigants to have counsel to assist them.” He concluded, “(t)o our poor citizens who may be assumed to need the protection of the *Charter* the most, any tax is calculated by its very nature to impair access to or protection of *Charter* rights and values. I conclude, therefore, that this tax does impair constitutional rights, values and protections.”²⁹

While McEachern, C.J.B.C. was dissenting in the sense that he would have addressed the substantive claim and declared the law *ultra vires* notwithstanding the absence of the “proof” referred to by Lambert J.A., the majority did not disagree with McEachern, C.J.B.C.’s statements of principle or his analysis: they simply declined to enter into the analysis in any substantive way.

²⁴ Para. 79.

²⁵ Para. 80.

²⁶ Para. 82.

²⁷ Para. 84.

²⁸ Para. 85.

²⁹ In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2000 B.C.S.C. 1135, the government served the respondent bands with stop work orders under the Province’s *Forest Practices Code*. The Bands challenged the constitutionality of certain sections of the Code. The government sought an order transferring the matter from the Chambers list to the Trial list. The Bands brought an application requesting that they be given an advance order of legal costs as a condition of any order transferring the matter to the trial list. The Bands said they were without funds to defend the proceeding if it were conducted by trial. Part of the Bands’ argument was based on “access to justice” as a component of the rule of law, and was based on *Carter, supra*. At paras. 80-81, the rule of law argument was dismissed without any substantive reasons being given.

Subsequent to the writing of this opinion, the B.C. Court of Appeal rendered a judgment in an appeal from the B.C. Supreme Court decision: 2001 B.C.C.A. 647 (see Addendum).

Securing Access to Counsel for Charter litigants: Advance Award of Costs

The principles of constitutionalism and rule of law, particularly as articulated by McEachern C.J.B.C., resonate with other cases in which the courts have acknowledged that individual litigants should not bear the costs of *Charter* litigation because of the important public interest in the determination of constitutional issues. This is most apparent in the few but important cases where the courts award costs in a constitutional case to an unsuccessful³⁰ or partially successful³¹ plaintiff against the successful Crown, or make no award of costs to a successful agent of the Crown.³²

It follows that if the court is willing to award costs at the *end* of a proceeding to a litigant who raises a serious constitutional question whether or not they are unsuccessful at trial, the court may be willing to order that funding should be provided at the *outset*. The importance of the issues, the public interest in having the issues determined, the difficulty of the case, and the financial consequences for the plaintiffs can all be determined before the proceedings begin.

In my opinion, strong grounds exist for an argument that an individual bringing a *Charter* challenge should be entitled to an order at the outset of the hearing that the individual will be entitled to his or her costs at the end of the hearing (or possibly before or during the hearing) regardless of the outcome, so long as the court is satisfied after hearing the constitutional challenge that:

- (a) the constitutional challenge was important and complex;
- (b) the Applicants' and Plaintiffs' claim was meritorious, regardless of whether it was successful;
- (c) there was a public interest in having the constitutional challenge litigated;
- (d) the Applicants and Plaintiffs
 - (i) did not engage in conduct that unnecessarily lengthened the conduct of the proceedings;
 - (ii) did not fail to admit everything that should have been admitted; and
 - (iii) took no step that was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution;
- (e) the Applicants and Plaintiffs are without financial resources; and
- (f) the amounts claimed for costs are reasonable.³³

³⁰ *B.(R.) v. Children's Aid Society of Metropolitan Toronto* (1992), 10 O.R. (3d) 321 (C.A.), affirmed (1995), 122 D.L.R. (4th) 1 (S.C.C.) at para. 122. *Horsefield v. Registrar of Motor Vehicles* (1999), 44 O.R. (3d) 73 (C.A.); *Westergard-Thorpe v. Canada (Attorney General)*, [1999] 4 F.C. 583 (T.D.), affirmed (2000), 183 D.L.R. (4th) 458 (Fed. C.A.).

³¹ *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)* (1996), 18 B.C.L.R. (3d) 319 (S.C.), affirmed [2000] 2 S.C.R. 1120.

³² *Hogan v. Newfoundland (A.G.)* (2000), 183 D.L.R. (4th) 225 (Nfld. C.A.); In *M. v. H.*, [1996] O.J. No. 2597 (Ont. Ct. Just.) at paras. 17 and 31, in holding an unsuccessful intervening A.G. liable for costs the court stated that *Charter* litigation should not be beyond the reach of ordinary citizens, and that private citizens should not have to bear the entire costs associated with complex *Charter* litigation. See also *Little Sisters*, *supra* at para. 18.

³³ Such an order may have to be conditional and/or subject to taxation, but this should not preclude an advance or interim award so long as it can be "clawed back" if the conditions are not fulfilled.

An application for this type of relief was attempted, but rejected by the Federal Court, in *Westergard-Thorpe v. Canada (Attorney General)*.³⁴ While the court expressed doubt as to whether it had jurisdiction to make an award of “costs” in advance at all, based on a restrictive interpretation of “costs” as by definition only being available after a hearing,³⁵ the court ultimately rested its decision to deny advance costs on an exercise of discretion rather than any issue of jurisdiction. Ultimately, although the plaintiffs were unsuccessful on the merits of their constitutional challenge, they were awarded costs at trial, at a level above the normal scale.³⁶ In my opinion, in cases where a stay is not a suitable remedy, a conditional order of the nature described above provides the best strategy for establishing and giving effect to a constitutional right to legal aid.³⁷

Indeed, a very similar argument met with success in a recent Alberta case, *Spracklin v. Kichton*.³⁸ The Plaintiff, Ms. Spracklin, sought an order requiring the Crown to provide interim costs to her in the sum of \$100,000, payable forthwith, in support of her section 15 *Charter* challenge to the definition of “spouse” in provincial legislation affecting her case, against Mr. Kichton, her former common law partner, for family property distribution. The Crown had appeared as an intervenor, as was its right, to defend the legislation.

Ms. Spracklin argued, and the court accepted, that she did not have the financial resources to answer the range of issues and evidence which Alberta would have the ability to put forward. She argued that being overwhelmed by a government response might exacerbate the denial of the full benefit of law on which her underlying *Charter* challenge was based.

The court held that it had jurisdiction to make costs awards as an incident of its superior court powers. However, the court emphasized that the order it would make under this jurisdiction would not be a decision to order “costs” as a *Charter* remedy, but would rather be an award of costs in a normal civil case. The court

³⁴ (1999), 167 F.T.R. 101 (decision on motion), judgment at [1999] 4 F.C. 583 (T.D.), affirmed (2000), 183 D.L.R. (4th) 458 (Fed. C.A.).

³⁵ In this regard, the court relied on a similar doubt expressed in *Woodward's Ltd. v. Montreal Trust Company of Canada* (1992), 74 B.C.L.R. (2d) 342 (C.A.). However, this judgment must be read in light of the later more liberal interpretation of costs in *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.), and indeed in *Woodward's* there was no determination of the question, only an expression of doubt. Other decisions have relied on a similar restrictive definition of “costs” as precluding interim or advance costs: *Re Hamilton and Wentworth* (1985), 51 O.R. (2d) 23 (Gen. Div.); *Re: National Energy Board Act (Can.)*, [1986] 3 F.C. 275 (Fed. C.A.); *Township of Bruce v. Thorburn* (1986), 57 O.R.(2d) 77 (Ont. Div. Ct.). However, in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2000 B.C.S.C. 1135, the court held there was an inherent jurisdiction to grant interim costs or costs in advance, in exceptional circumstances.

³⁶ [1999] 4 F.C. 583 (T.D.), affirmed (2000), 183 D.L.R. (4th) 458 (Fed. C.A.).

³⁷ Both because a section 24 remedy is only available to a person whose *Charter* rights have been violated, and because the courts may be more willing to recognize a right to legal aid the more the scope of the right is circumscribed, in my opinion arguments based on the principles of constitutionalism and rule of law ought to be focused on litigants who are personally affected by some government action or constitutional breach. While the principles underlying these arguments would conceptually apply to an individual or organization seeking public interest standing to bring a constitutional challenge, the persuasive force of the arguments may be greatly reduced.

³⁸ (2001), 203 D.L.R. (4th) 22 (Alta. Q.B.).

concluded that it should make an order “comparable to an interim order for costs against Alberta” but characterized the order more as “requiring Alberta to provide counsel for Spracklin in relation to her need for representation on the subject of the constitutional challenge.”³⁹ The court gave the following reasons:⁴⁰

1. Ms. Spracklin was an individual person, and not a corporation, association, or representative plaintiff.
2. Ms. Spracklin was not financially able to be represented on the constitutional challenge at her own expense. (She would qualify for Alberta legal aid if this type of case had qualified for the legal aid program.)
3. Ms. Spracklin was not legally trained. She was not capable of dealing with the complex and important legal issues raised by her *Charter* challenge, without counsel.
4. Her *Charter* challenge was not frivolous. It has direct implications for her.
5. Her challenge raises matters of importance to Canada, Alberta and human dignity.
6. Her challenge is not in support of a claim against the state as such.
7. The issue might not get adjudicated properly in this or future cases in the absence of a comparatively wealthy common law “spouse” wishing to go forward with it.
8. Alberta does not have a court challenges program for which Ms. Spracklin would be eligible.
9. The negative consequences of proceeding without representation were plain. The court could not adequately or fairly give technical assistance to Ms. Spracklin in the “helping hand” sense.
10. The court would not make a cash grant, but would require Alberta to arrange for reasonable representation by competent counsel. Costs would be paid by Alberta at the end of the proceedings (regardless of outcome) and would be taxed in the ordinary way if disputed.

While the order in *Spracklin* was not based on a constitutional entitlement to counsel *per se*, in my view the reasoning is very closely related to, and supportive of, the constitutional arguments set out above. In my opinion, applications of the sort made in *Westergard-Thorpe* and *Spracklin* present the strongest strategy for establishing a broad right to counsel in such proceedings.

Constitutional Principles and Remedies informed by Section 24(1) of the Charter

In my opinion the arguments set out above could be further supported by arguing that the principle of constitutionality in general, and section 24(1) in particular, must be read in conjunction with and/or informed by the values contained in section 15 of the *Charter* (which will be elaborated upon in the following

³⁹ Para. 80.

⁴⁰ Para. 81.

section). The ability to apply to a court for a constitutional remedy is fundamentally a protection or benefit of the law to which all individuals should be entitled, without regard for their financial status. As representation by counsel is crucial to the effectiveness of an individual's application under section 24(1), the values contained in section 15 of the *Charter* must require that an indigent person be provided with counsel to assist in the vindication of his or her rights.

ARGUMENTS APPLICABLE TO BOTH GOVERNMENT-INITIATED AND INDIVIDUAL-INITIATED PROCEEDINGS

Section 15 of the *Charter*

Where the government takes action, or denies a benefit, authorized by law, or where an individual seeks to challenge the constitutionality of legislation, section 15 of the *Charter* may provide an additional argument. Section 15(1) of the *Charter* states:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

In *Law v. Canada (Minister of Employment and Immigration)*,⁴¹ the Supreme Court of Canada outlined the approach to be taken to section 15 claims:

First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of section 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of section 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by section 15(1).⁴²

The Supreme Court of Canada has emphasized that these are guidelines and do not represent a strict test. The analysis described above should be understood as

⁴¹ [1999] 1 S.C.R. 497.

⁴² At para. 39.

points of reference for a court that is called upon to decide whether a claimant's right to equality without discrimination under the *Charter* has been infringed.⁴³ I will consider the three components of the analysis in the following sections.

(a) Differential Treatment

In a situation where:

- (i) the government denies a benefit provided under law (for instance, denial of Employment Insurance benefits), or otherwise takes action that may not in itself engage section 7 *Charter* rights,
- (ii) a person who wishes to challenge the law or action and could afford legal counsel would be in an advantageous position compared to a person who cannot afford legal counsel, and
- (iii) any available legal aid program does not provide legal aid in the circumstances,

it could be argued that the laws in question fail to take into account the claimant's already disadvantaged position within Canadian society, resulting in substantively differential treatment between the claimant and others on the basis of the personal characteristic of poverty.⁴⁴ The differential treatment arises from the *combined* effect of an “underinclusive” legal aid statute⁴⁵ and the statute under which the government action or benefit is authorized.

(b) Poverty as Analogous Ground

The applicant must next establish that poverty is a ground that is analogous to those enumerated in section 15(1): race, national or ethnic origin, colour, religion, sex, age, and mental or physical disability. In *Corbiere v. Canada*, the majority of the Supreme Court of Canada held that an analogous ground is one based on a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity (i.e. “constructively immutable”).⁴⁶

The caselaw is not conclusive on whether poverty or economic disadvantage is an analogous ground. In *Polewsky*, Gillese J. concluded that it was not. However, in granting leave to appeal from that judgment, Misener J. held that “a very good

⁴³ *Law, supra* at para. 88; *M. v. H., supra* at para. 46.

⁴⁴ In *Polewsky v. Home Hardware Stores Ltd.* (1999), 40 C.P.C. (4th) 330 (Ont. Sup. Ct.) at para. 40, Gillese J. concluded that by imposing a fee on all litigants the Small Claims Court Rules made a distinction that denied the claimant equal benefit of the law, that the failure to provide a discretion to waive the fee failed to take into account the underlying differences between individuals in society with the result that it was more difficult for the claimant to access the civil justice system than for those of greater financial means. This amounted to a denial of equal benefit of the law and satisfied the first step of the section 15 analysis.

⁴⁵ In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, an “underinclusive” human rights statute was held to violate section 15 rights, because the failure to include sexual orientation as a protected ground under the legislation constituted differential treatment.

⁴⁶ [1999] 2 S.C.R. 203 at para. 13; see also *Law v. Canada, supra*.

argument can be made that [Gillese J.] erred” in her ultimate conclusion that the fees did not violate section 15, and specifically “a very good argument can be made” that poverty is an analogous ground.⁴⁷

In the very recent Ontario Court of Justice judgment in *R. v. Banks*,⁴⁸ the defendants had been charged under the Ontario *Safe Streets Act*, S.O. 1999, c. 8, an anti-panhandling/anti-squeegee statute. The defendants charged the statute under section 15, arguing that the *Act* discriminated against them on the personal characteristic of “extreme poverty.” The Crown argued that “extreme poverty” was neither immutable nor constructively immutable and was thus not an analogous ground. The court in *Banks* concluded that “while the weight of authority is against recognizing poverty in itself as an analogous ground, the issue cannot be said to be finally settled.”⁴⁹ However, the court did not make a determination on this factor, apparently deciding the section 15 argument instead on either the first or the third branch of the test.⁵⁰

The Supreme Court of Canada has not yet addressed the question of whether poverty is an analogous ground under section 15 of the *Charter*, although this question may arise in *Gosselin v. Québec*,⁵¹ to be heard this fall.

In my opinion it is arguable that in our society poverty is generally not something that an individual can change of his or her own accord. There is ample research to support the proposition that it is the Canadian social and economic system that keeps many individuals in a state of poverty, not a lack of personal initiative on the part of the individuals. It could be argued that by “immutable” and “constructively immutable,” the Supreme Court of Canada must have meant that the characteristic is beyond the individual’s *own present capacity* to change, and that poverty is such a characteristic.⁵²

While poverty may not be “inherent” in the same sense as a person’s physical attributes are “inherent,” nevertheless it is not something that most people come to by “voluntary choice,” nor through “behaviour,” nor is it something over which most people have individual control. In the Supreme Court of Canada decision in *Miron v. Trudel*,⁵³ in holding that marital status was an analogous ground McLachlin J. (as she then was) stated as follows:

⁴⁷ Paras. 11 and 18.

⁴⁸ [2001] O.J. No. 3219 (Ont. Ct. Justice).

⁴⁹ Para. 75.

⁵⁰ *Ibid.*

⁵¹ 1999 C.S.C.R. no. 364 (Q.L.) (S.C.C.).

⁵² “What does warrant a constitutional remedy is the claim that a person has been unfairly treated by reason of a condition over which the person has no control.” Hogg, *Constitutional Law of Canada* at p. 52-28. Professor Hogg does not directly apply this reasoning to poverty. He does cite Howse, “Another Rights Revolution” in *Redefining Social Security* (1995), 120 for an argument that economic disadvantage is sufficiently immutable to be an analogous ground (note 107a, p. 52-28).

⁵³ [1995] 2 S.C.R. 418.

In short, marital status often lies beyond the individual's effective control. In this respect, marital status is not unlike citizenship, recognized as an analogous ground in *Andrews*: the individual exercises limited but not exclusive control over the designation.⁵⁴

It could be argued and evidence could be presented that in Canadian society poverty is inherent in the economic and social system, and that these systems, more than any personal characteristic, determines who among the citizenry will be poor. Further, many of the wealthy in Canada in fact acquired their wealth through inheritance (literally). Thus poverty is analogous to the enumerated grounds both in that it is beyond most people's own present capacity to change, and also in that it is largely imposed by society rather than through a person's behaviour.

(c) Discrimination in a Substantive Sense

The final inquiry in the section 15 analysis is whether the differential treatment discriminates in a substantive sense against individuals living in poverty. The Supreme Court of Canada has ruled that this inquiry must be undertaken in a purposive manner. In other words, it is necessary to determine whether the impugned differential treatment in this case is inconsistent with the purposes of section 15 of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage, which the Supreme Court of Canada has summarized as follows:

... to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect, and consideration. (...) Alternatively, differential treatment will not likely constitute discrimination within the purpose of section 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society.⁵⁵

Within this context, the two-part inquiry at this stage of the analysis is whether the differential treatment (i) imposes a burden upon or withholds a benefit from individuals living in poverty (ii) in a manner that reflects the stereotypical application of presumed group or personal characteristics, or otherwise perpetuates or promotes the view that the individuals are less capable or worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration.⁵⁶

⁵⁴ *Miron v. Trudel*, *supra* at para. 153.

⁵⁵ *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143 at 171; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 583-584; *Eldridge v. B.C. (A.G.)*, [1997] 3 S.C.R. 624 at 666-667; *Vriend v. Alberta*, *supra* at 535; *M. v. H.*, [1999] 2 S.C.R. 3 at 26 and 46; *Law v. Canada*, *supra* at 518-519 and 524-531.

⁵⁶ *M. v. H.*, *supra* at 53.

(i) Equal Benefit of the Law

In *M. v. H.*,⁵⁷ in response to an argument that the family law statute did not deny same-sex partners equal benefit of the law since same-sex spouses were not being denied an economic benefit, but simply the opportunity to gain access to a court-enforced process, the Supreme Court of Canada held that such an analysis would take too narrow a view of "benefit" under the law. The court specifically held that the type of benefit salient to the section 15(1) analysis was not simply direct economic benefit but must also include *access to a process* that could confer an economic or other benefit.

Almost by definition, a failure to provide legal counsel to those who cannot afford it deprives those individuals of the equal benefit of the law. The connection between effective benefit of the law and the right to counsel was examined in some detail in the previous section, particularly in relation to *Carten, supra* and *Polewsky, supra*.

(ii) Demeaning to Dignity

The second issue to be addressed in determining whether the differential treatment is demeaning to the dignity of individuals living in poverty, within the broadened meaning of "dignity" for the purposes of section 15.⁵⁸ The Supreme Court of Canada has outlined a number of "contextual factors" that may influence this determination, but has emphasized that the list of factors is not closed, and there is no specific formula that must be considered in every case.⁵⁹ Of the four factors so far identified, the following are relevant to the present inquiry: (1) pre-existing disadvantage, (2) the relationship between the ground upon which the claim is based and the nature of the differential treatment, and (3) the nature of the interests affected. In examining these contextual factors, a court must adopt the point of view of a reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim.⁶⁰

Pre-existing Disadvantage

In *Law v. Canada, supra*, the Supreme Court of Canada stated that

... probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group [citations omitted]. These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue

⁵⁷ [1999] 2 S.C.R. 3.

⁵⁸ *Law v. Canada, supra* at para. 62.

⁵⁹ *M. v. H.* at para. 67. *Law v. Canada, supra* at paras. 64-65.

⁶⁰ *M. v. H.* at para. 67.

of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.⁶¹

Individuals living in poverty are already subject to unfair circumstances or treatment in society by virtue of their personal circumstances. They have historically often not been given equal concern, respect and consideration. They are clearly already vulnerable. Social science and historical materials could be used to establish this fact. Thus, the “pre-existing disadvantage” factor weighs in favour of finding a violation of the dignity of those living in poverty through a failure to provide legal aid.

Relationship Between Grounds and the Claimant's Characteristics or Circumstances

The second potentially relevant contextual factor is correspondence, or the lack of it, between the ground on which a claim is based and the actual need, capacity, or circumstances of the claimant or others. As Justice Iacobucci stated in *Law*:

... it will be easier to establish discrimination to the extent that impugned legislation fails to take into account a claimant's actual situation, and more difficult to establish discrimination to the extent that legislation properly accommodates the claimant's need, capacities, and circumstances.⁶²

For example, in *Eldridge v. British Columbia (Attorney General)*,⁶³ a provincial government's failure to provide limited funding for sign language interpreters for deaf persons when receiving medical services was found to violate section 15(1), in part on the basis that the government's failure to take into account the actual needs of deaf persons infringed their human dignity.

Similarly, to the extent that existing legal aid legislation fails to cover particular types of hearings or proceedings relating to government actions or benefits, or to the extent existing legal aid programs are targeted for cutbacks, the legal aid legislation, taken together with the relevant statute authorizing the action or benefit, fail to adequately take into account the actual situation of individuals living in poverty. In particular, such legislation fails to recognize or accommodate the particular need for legal aid in navigating complex administrative and judicial systems.⁶⁴

⁶¹ At pp. 534-535. The court stressed that proof of the existence of a stereotype in society regarding a particular person or group is not an indispensable element of a successful claim under section 15(1) (para. 64).

⁶² *Law v. Canada, supra* at 538.

⁶³ [1997] 3 S.C.R. 624.

⁶⁴ See *Carten, supra*.

Nature of the Interest Affected

A third contextual factor is the nature of the interest affected by the discrimination. In *Law, supra* the court stated as follows:

A further contextual factor which may be relevant in appropriate cases in determining whether the claimant's dignity has been violated will be the nature and scope of the interest affected by the legislation. (...) [T]he discriminatory calibre of differential treatment cannot be fully appreciated without evaluating not only the economic but also the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation in question. Moreover, it is relevant to consider whether the distinction restricts access to a fundamental social institution, or affects "a basic aspect of full membership in Canadian society," or "constitute[s] a complete non-recognition of a particular group."⁶⁵

The lack of provision of legal aid certainly restricts access to a fundamental social institution: the courts. The Constitutional significance of this right of access to the courts will be considered in greater detail below. In this regard, it is difficult to contemplate a deprivation that would more compellingly address this third factor. Further, in administrative proceedings such as income assistance or other welfare benefit proceedings the interests at stake are of particular significance to persons living in poverty.

Previous cases

In *Polewsky, supra*, Gillese J. held that the plaintiff had not led evidence to suggest that the absence of a discretion to waive fees on the basis of poverty is based on the application of stereotypical notions of the poor or that it has the effect of reinforcing negative or inappropriate views of the poor. Gillese J. seemed to hold that a substantive disadvantage is not enough, it must be based on a stereotype or assumption about a person or group of persons.⁶⁶ She held there was no evidence that the fees were meant to limit access to the courts for the poor nor that they had that effect. She declined to take judicial notice of the "cycle of poverty" or the historical disadvantage to persons in poverty. On the basis that poverty was not analogous and that no substantial discrimination had been proven, she rejected the section 15 argument.

In the leave to appeal decision in *Polewsky*, as noted above Misener J. held that there was a very good argument that the conclusions of Gillese J. were in error. Misener J. specifically stated as follows:

⁶⁵ *Law v. Canada, supra* para. 74.

⁶⁶ Paras. 60, 62.

It is surely a matter of judicial notice that the tariff of fees in question denies, as a practical matter, access to the Small Claims Court for the redress of civil wrongs to a significant number of citizens of this Province, and it was conceded, for the purposes of this motion, at least as I understood it, that Mr. Polewsky is one of that number. (...) The fees presently in force deny all access to that institution to those who are unable to pay them.

In *Okanagan Indian Band*,⁶⁷ Sigurdson J. of the B.C. Supreme Court also seems to have concluded that the test at this stage was solely whether the Bands would be treated in a manner that reflects stereotypical application of presumed group or personal characteristics, such that it would demean the claimant's human dignity.⁶⁸ The court held the failure to provide funded counsel to the Bands would not meet this test (apparently not even if this failure did in fact prevent the Bands from any forum in which to make their constitutional claims). The court held that the costs facing the litigants would not be the product of the court's decision to transfer the matter to the trial list, but rather would flow from the nature of the underlying dispute. On this basis, the court rejected the section 15 arguments.

In my opinion, with respect, the court in *Okanagan Indian Band*, like Gillese J. in *Polewsky*, did not correctly apply the contextual factor-based analysis described by the Supreme Court of Canada in *Law, supra* and *M. v. H., supra*.

Summary of Section 15 Argument

In my opinion, a constitutional right to legal aid will arise in a range of proceedings where the government takes action or denies a benefit provided under law. Where a person who cannot afford counsel to challenge the action or law would be at a disadvantage compared with a person who can afford counsel, differential treatment results. In my opinion there are reasonable grounds to argue that this differential treatment is based on an analogous ground for the purposes of section 15: poverty. Finally, the contextual analysis strongly supports the conclusion that failure to provide legal aid violates the dignity of individuals living in poverty, as they suffer a pre-existing disadvantage, their needs are not recognized or accommodated, and the nature of the interests thereby affected, including their right of access to the courts, are significant.

CONCLUSIONS

The courts have already held that state-funded counsel will be ordered as of right if necessary for a fair hearing in accordance with section 7 of the *Charter*. Consequently, where it can reasonably be argued that life, liberty or security of

⁶⁷ 2000 B.C.S.C. 1135.

⁶⁸ Para. 118.

the person is at stake due to government action, one line of argument will seek to expand the range of hearings for which fairness requires state-funded counsel.

For proceedings commenced by individuals against government, an argument could be made pursuant to the principles of constitutionalism and rule of law.

An argument based on section 15 of the *Charter* would be applicable to both types of proceedings.

Addendum: Subsequent to the writing of this opinion, the British Columbia courts rendered two judgments relevant to funding for constitutional challenges: *British Columbia (Minister of Forest) v. Okanagan Indian Band*, 2001 B.C.C.A. 647 and *Roger William et al v. Riverside Forest Products Limited et al*, 2001 B.C.S.C. 1641. In each case, while not directly relying on constitutional rights as a basis, the courts ordered the Crown to pay costs in advance and in any event of the cause to aboriginal litigants who otherwise would have been financially unable to bring their constitutional claims effectively before the court.

The Constitutional Right to Legal Representation in Family Law Proceedings*

Nicholas Bala**

CONTEXT AND SCOPE OF THIS PAPER

By the end of the 1980s, Canadian courts recognized the constitutional right of a person accused of a serious criminal offence who does not have means to retain counsel to have legal representation paid for by the state.¹ Accused persons face a direct threat to their “liberty and security of the person” and, in many cases will not have a fair trial unless they are represented by counsel. Accordingly, the courts have held under the *Canadian Charter of Rights and Freedoms*,² if the government fails to provide an indigent accused with counsel, the proceedings may need to be stayed. This in effect may result in indigent accused persons having a qualified right to counsel paid by the state. While this right is not absolute, and depends on the nature of the charge, the complexity of the issues, and the ability of the accused to provide self-representation, this type of jurisprudence has caused legal aid administrators to ensure that in most criminal prosecutions, indigent accused persons are eligible for representation.

As a consequence of the under funding of legal aid by governments and of the priority given to criminal law cases, the burden of legal aid cutbacks has tended to fall on individuals involved in litigation in other types of cases. In particular, in many places in Canada, legal aid plans have reduced eligibility of individuals for legal aid funding in family law cases, or provide such a limited amount of funding

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¹ See e.g. *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 63 C.R. (3d) 113 (Ont. C.A.); *R. v. McKibbin* (1988), 45 C.C.C. (3d) 334, 31 O.A.C. 10 (C.A.); *R. v. Munroe* (1990), 57 C.C.C. (3d) 421 (N.S.S.C.), aff’d 59 C.C.C. (3d) 446 (N.S.C.A.); *R. v. Chan*, [2000] A.J. 891 (Alta C.A.); see also *R. v. Prosper*, [1994] 3 S.C.R. 236, 33 C.R. (4th) 85.

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 (‘the Charter’).

as to make effective representation impossible. Despite the profound importance of these proceedings to the individuals and to society as a whole, many of those involved in family law cases are left to proceed through the court system without legal representation.

In a very significant 1999 case, *New Brunswick v. G.(J.)*³ the Supreme Court of Canada recognized that child-protection proceedings pose a fundamental threat to the “security of the person” of parents and their children. Hence section 7 of the *Charter* requires that these proceedings must be conducted in accordance with “the principles of fundamental justice.”⁴ Thus, depending on the complexity of a cases and a parent’s ability of self-representation, a court may invoke the *Charter* to order that legal representation is provided to indigent parents whose children have been apprehended by a child protection agency.

This paper reviews the decision of the Supreme Court of Canada in *G.(J.)* and considers its implications for other situations where there may be a constitutionally based claim for legal representation in family law cases.⁵ The issues raised are complex. Often, the discussion in this paper suggests types of arguments that might be made rather than providing an exhaustive analysis. For a number of issues, I consider American jurisprudence, though this paper does not purport to exhaustively compare legal developments in the two countries.

It is worth noting that the United States Supreme Court rendered a decision quite similar to *G.(J.)* twenty years ago. This provided for a qualified constitutional right to legal representation in proceedings in which a state child protection agency is seeking to terminate parental rights due to allegations of abuse or neglect.⁶ However, there have not been any recent Supreme Court decisions in the United States that have significantly extended constitutional rights to representation in family law proceedings. This may suggest that further jurisprudential developments in this area are likely to be incremental after the dramatic change in *G.(J.)*.

As will be more fully discussed in this paper, since *G.(J.)* was decided in 1999, Canadian courts have been reluctant to extend this decision beyond the child protection context. Even in the child protection area, the courts have been slow to extend constitutional rights beyond the right of parental representation.⁷ More

³ [1999] S.C.J. 47.

⁴ Section 7 of the *Charter* provides: “Everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

⁵ There is relatively little writing in Canada which discusses the implications of *G.(J.)* or the issue of a constitutional right to representation in family law cases; see D.A.R. Thompson, “Annotation to *G.(J.)*” (1999) 50 R.F.L. (4th) 74; D.A.R. Thompson, “No Longer ‘Anything But the *Charter*’: The New ABC’s of the *Charter*,” National Judicial Institute Family Law Program, Halifax, February 16, 2001; Bala, “*The Charter of Rights & Family Law in Canada: A New Era*” (2001) 18(3) Canadian Family Law Quarterly 373 - 428; and S. Boyd, “The Impact of the *Charter of Rights and Freedoms* on Canadian Family Law” (2000) 17 Can. J. Fam. L. 293.

⁶ *Lassister v. Department of Social Services* (1981), 101 S.Ct. 2153.

⁷ See e.g. *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519.

generally, recently the courts have seemed more reluctant to invoke the *Charter* to regulate and direct government action, especially actions that may require expenditure of funds.⁸

The focus of this paper is on how counsel or individuals can make constitutionally based arguments in the courts to obtain legal representation for the economically disadvantaged. Such a litigation-based process for achieving legal representation imposes enormous burdens on those who are most vulnerable in our society. Unless parents, spouses and children have adequate legal representation, there will not be justice in our family courts. A much preferable solution is for governments to recognize needs in this area, and provide adequate funding for family law legal aid.

THE IMPORTANCE OF CONTEXT AND THE BEST INTERESTS OF THE CHILD

An introductory point should be made for those considering making any type of *Charter* based claim in a family law case. To successfully invoke the *Charter* in a family law case, it is important to have a sympathetic factual context, either in terms of the general issue raised or the specific litigant before the court, or preferably both.

In some areas of law, most notably in the criminal context, judges may be prepared to protect constitutional rights in very unsympathetic factual situations. Courts may allow those who appear to be guilty of murder to be discharged if there is a serious *Charter* violation.⁹ In the family law area, especially when the interests of children are involved, it is clear that judges are most willing to invoke the *Charter* if the specific facts or the general context of this type of case suggests that this is likely in to be “the right thing to do.” The courts seem most willing to use the *Charter* in the family law cases to promote social justice or to promote the interests of children.

Those who are making a *Charter* based claim to representation, or their advocates, would be well advised to submit some information about the context of their claim. If children are involved, it would be helpful to explain how representation will advance the interests of the children in the case, perhaps by ensuring that there is as much information as possible available to court. Conversely, those advancing these claims should be aware that a major concern of the court will be the effect of an order for representation on the welfare of children. For example, courts are often concerned that such an order might delay the proceedings or add to their complexity.

⁸ See e.g. *Doucet-Boudreau v. Nova Scotia (Department of Education)*, [2001] N.S.J. 240 (C.A.).

⁹ See e.g. *R. v. Feeney* (1997), 7 C.R. (5th) 101 (S.C.C.).

It is also important to note that if a judge is convinced that the interests of a child would be advanced by having representation for a child *or a parent*, in some cases the judge may order representation without invoking the *Charter*. A superior court judge may be able to invoke an inherent judicial authority (the so-called *parens patriae* power) to order representation.¹⁰ While the *parens patriae* power is wide, and includes the authority to direct that legal representation should be provided, judges are reluctant to use this power.

HOW DOES A CLAIM FOR REPRESENTATION UNDER THE *CHARTER* ARISE?

Cases that raise *Charter* issues are often complex. This is particularly true in the family law area. *Charter* claims in the family law area are based more on jurisprudence than on the explicit words of the *Charter*. Also, the resolution of these cases may require a difficult judicial balancing of individual and state interests.

There are inherent difficulties that arise in considering a *Charter* based claim for representation. Frequently, the claim will be made by an unrepresented individual. Almost by definition, such individuals lack the skills and resources to effectively make the type of complex constitutional argument that is needed in this situation.

In some cases, the court will raise the issue of representation on its own (*proprio motu*).¹¹ Indeed, if a judge believes that the *Charter* requires representation for an unrepresented individual, it would seem that the judge has a duty to raise this question, and ask that those involved in the case address the issue.¹² However, doing this may place the judge in the unenviable position of raising and then trying to resolve complex substantive and procedural issues.

In a few cases, counsel has been prepared to argue that the issue of the right to representation *pro bono*. This occurred in the seminal case of *G.(J.)*, but there are

¹⁰ The *parens patriae* jurisdiction [Latin for 'parent of the country'] is based on the authority of the old courts of Equity to promote the welfare of children. This power clearly includes the right to appoint a lawyer for a parent or a child, if this is necessary to promote the interests of a child; see *I.N. v. Newfoundland (Legal Aid Commission)* (2000), N.J. 312 (Nfld. U.F.C.). While judges are not quick to invoke this jurisdiction, from the perspective of a litigant it may be preferable for a judge to make an order under the court's *parens patriae* power since the scope for appellate review is limited, and unlike with a constitutional challenge, there is technically no need for notice to be given to the Attorney General before an order is made. This power can only be exercised by 'superior court judges' (i.e. those appointed by the federal government sitting in courts like the Alberta Court of Queen's Bench, the British Columbia Supreme Court, the Ontario Superior Court, or the Newfoundland Unified Family Court; it cannot be exercised by provincial or territorial appointees i.e. judges sitting in a Provincial or Territorial Court).

¹¹ Latin for "on its own motion." An argument or motion made by the court without being requested by a party.

¹² See *R. v. McKibbin* (1988), 45 C.C.C. (3d) 334 at 346 (C.A.), about the duty of a judge in a criminal proceeding in dealing with an unrepresented accused.

clearly limitations on lawyers carrying forward these claims without compensation.¹³

A necessary element of any constitutionally based claim to representation is establishing that the applicant cannot afford to retain counsel, that is, he or she is “indigent.”¹⁴ Anyone advancing such a claim should be prepared to establish the income and asset position of the claimant.

Unrepresented individuals, judges and counsel clearly need assistance in dealing with the issue of constitutionally based claims to representation. In some cases there may be special programs, advocacy groups or legal aid clinics that may be of assistance with some *Charter* challenges.¹⁵

The Canadian Bar Association is playing a role in supporting these challenges, for example by making research (like this paper and others on this topic) widely available. There may also be a role for the C.B.A. and other organizations in providing advice or contacts with mentors or *pro bono* counsel.

NOTICE AND HEARING REQUIREMENTS

Most jurisdictions require a litigant raising a constitutional question to give notice to the relevant Attorney General or Minister of Justice. This allows the government to defend the statute in question or to oppose the remedy sought, since the other party in the case may not have the same interest as the government in opposing the constitutional challenge.¹⁶

In some cases in which a *Charter* based claim for representation has been made, the judge has directed that notice be given to the local legal aid office in addition to, or instead of the Attorney General.¹⁷ This allows the legal aid office to grant legal aid and obviate the claim, or to appear in court to oppose the claim. Technically, if an order for representation is made in a family law case, the order will provide that counsel be paid by the provincial government (i.e. the Ministry

¹³ In the end, counsel for the mother in *G.(J.)* recovered his costs from the government of New Brunswick, but only because the claim was successful and as a matter of judicial discretion. He had to pursue this case through the trial, appeal and Supreme Court of Canada without any assurance of payment. The uncertainty of receiving compensation (or even reimbursement for disbursements and expenses) clearly limits the extent to which lawyers can make these claims.

¹⁴ A discussion of the operative definition of “indigent” or “without means to retain counsel” is beyond the scope of this paper. However, it is clear from the criminal context, that in assessing this question, courts will consider not only the income and assets of the individual, but also the quantity (i.e. expected cost) of legal services required; *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 63 C.R. (3d) 113 (Ont. C.A.).

¹⁵ For example, in some cases women may be able seek support from the Women’s Legal Education and Assistance Fund (L.E.A.F.). For some challenges involving federal legislation, like the *Divorce Act*, there may be support from the Court Challenges Program (294 Portage Avenue, Suite 616, Winnipeg, Manitoba, R3C 0B9, tel. 204-942-0022).

¹⁶ See e.g. *Ontario Courts of Justice Act*, R.S.O. 1990, c. 43, section 109; *British Columbia, Constitutional Questions Act*, R.S.B.C. 1996, c. 68, section 8.

¹⁷ See e.g. *Walton v. Simpson* (2000), B.C.S.C. 758.

of the Attorney General or Minister of Justice), not by the legal aid plan. In practice, however, legal aid offices that are notified on behalf of the government do appear to contest these applications.

Notice requirements for constitutional issues are intended to ensure that before a judge makes a binding *Charter* order, the government has some opportunity to oppose the making of an order. If the case involves a situation where there is uncertainty about whether this is the *type of case* in which an order to pay for counsel should be made, there should be notice to the government *before* an order is made.

In some situations, notably child protection proceedings, there is clear and binding precedent that there is, in appropriate cases, a constitutional right of a parent to counsel paid by the government. In these situations legal aid will usually be provided, but if not a judge might decide to simply make the order directing the Attorney General to provide that independent representation to the parent within (say) two weeks, unless the government wishes to file a notice to challenge the order within that time period, and stipulating that the order is notice of the constitutional application.

In some cases it might be appropriate for a judge to direct that an *amicus curiae* counsel¹⁸ be appointed (and paid by the government) to investigate and argue the issue of whether there is a constitutional right to representation. The matter of representation for an unrepresented indigent parent should be dealt with in an expeditious fashion so as not to prejudice the interests of any child involved. Ordinarily, it should be resolved without appointment of an *amicus curiae*. However, if the legal context is novel, appointment of an *amicus curiae* may be desirable.

If the representational issue is arising in a novel context, the government is likely to appear to oppose the request. If an order for representation is made by the trial judge, there is the prospect of an appeal on this issue. If there is an appeal on the representation issue, this legal issue should be severed from the proceeding dealing with the child and should not delay making a decision about the child.¹⁹

CHILD PROTECTION PROCEEDINGS: *NEW BRUNSWICK V. G.(J.)*

There are few instances of more dramatic state interference with individual and familial autonomy than in child protection proceedings. In this context, agents of the state have broad powers to enter premises, apprehend children from their homes and terminate profoundly important relationships. In the first fifteen years that the *Charter* was in effect, there were some judges who were prepared to

¹⁸ *Amicus curiae*: Latin for "Friend of the Court."

¹⁹ Such a severance occurred in *New Brunswick v. G.(J.)*, *supra*, note 3.

subject this type of state action to constitutional scrutiny. However, the majority of appellate judges and the Supreme Court focused on the fact that this type of proceeding is *intended* to protect children and promote their welfare, and refused to find that constitutional provisions were engaged in these proceedings.²⁰

However, in its 1999 decision in *New Brunswick (Minister of Health) v. G.(J.)*, the Supreme Court of Canada sent a strong and clear message that parents have a vital interest in their relationship with their children. In child welfare proceedings this interest is entitled to protection under section 7 of the *Charter* as an aspect of “security of the person.”²¹ The court concluded that, pursuant to section 7 of the *Charter*, an indigent mother whose children had been apprehended by a child-welfare agency had a constitutional right to be represented by counsel paid by the government. This was to ensure that the temporary wardship proceedings were “in accordance with the principles of fundamental justice.”

Writing for the majority of the court,²² Lamer C.J.C. focused on the argument that a child protection proceeding represents a threat to the “security of the person” of both parent and child. Thereby, he purported to distinguish his own decision in 1994 in *B.(R.) v. C.A.S. of Metropolitan Toronto*, in which he dismissed the notion that section 7 of the *Charter*, and in particular the “liberty interest,” could be engaged in child protection proceedings. While *B.(R.)* and *G.(J.)* are factually distinguishable, the rhetoric and approach of Lamer C.J.C. in the two cases is very different.

In any event, it is now clear that when faced with a concrete situation in which parents or children are subject to treatment in a child protection proceeding that does not accord with the “principles of fundamental justice,” the courts will respond.

In *G.(J.)*, the court invoked the constitutional rights of a parent, but was clearly influenced by a concern for the welfare of children.²³ Chief Justice Lamer wrote:²⁴

²⁰ See e.g. *Catholic C.A.S. v. T.S.* (1989), 20 R.F.L. (3d) 337 (Ont. C.A.) dismissing claims to parental rights in child protection proceedings. *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, 9 R.F.L. (4th) 157.

²¹ [1999] 3 S.C.R. 46, 50 R.F.L.(4th) 63; see accompanying Annotation by D.A.R. Thompson at R.F.L. 74-78 which discusses the context and implications of the Supreme Court judgment.

²² The case was decided by a seven-member panel. Bastarache J. was recused since he sat on this case when a judge of the New Brunswick Court of Appeal, though it is clear from his (dissenting) judgment there (131 D.L.R. (4th) 273) that he supported the Supreme Court decision. L'Heureux-Dubé J. gave an opinion concurring with Lamer C.J.C., though arguing that “liberty” as well as “security of the person” were involved (an academic distinction only) and that section 15 issues were also raised in this situation, since the parents affected by child protection proceedings are disproportionately low income, single mothers.

²³ Conversely, courts are unlikely to recognize parental rights if doing so is likely to be harmful to a child. *In re Brandon W.*, 747 A. 2d 526, 2000 Conn. App. Lexis 23 (Conn. App. 2000) the appeal court upheld a trial decision to refuse to allow the mother to call her young children as witnesses in a child abuse proceeding based on allegations of sexual abuse. Parental rights of confrontation should not be interpreted in such a way as to potentially harm the young children by directly involving them in the adversarial process.

²⁴ At paras. 70 & 76 (emphasis added).

Thus, the interests of fundamental justice in child protection proceedings are both substantive and procedural. The state may only relieve a parent of custody when it is necessary to protect the best interests of the child, provided that there is a fair procedure for making this determination....

The interests at stake in the custody [child protection] hearing are unquestionably of the highest order. Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent's right to security of the person at stake, *the child's is as well*. *Since the best interests of the child are presumed to lie with the parent*, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship.

The court recognized that, in the specific circumstances of the case, it was not dealing with a permanent termination of the parent-child relationship but only a review of temporary wardship. Nevertheless, it concluded that the parent's constitutional rights were engaged. A judge considering a request for counsel must assess the circumstances and complexity of the case. In this particular case, Lamer C.J.C. commented:²⁵

A six-month separation of a parent from three young children is a significant period of time. It is even more significant when considered in light of the fact that the appellant had already been separated from her children for over a year and that generally speaking, the longer the separation of parent from child, the less likely it is that the parent will ever regain custody ...

At issue in this appeal is whether the custody hearing would have been sufficiently complex ... that the assistance of a lawyer would have been necessary to ensure the appellant her right to a fair hearing. I believe that it would have been. Although perhaps more administrative in nature than criminal proceedings, child custody [wardship] proceedings are effectively adversarial proceedings which occur in a court of law. The parties are responsible for planning and presenting their cases. While the rules of evidence are somewhat relaxed, difficult evidentiary issues are frequently raised. The parent must adduce evidence, cross-examine witnesses, make objections and present legal defences in the context of what is to many a foreign environment, and under significant emotional strain. In this case, all other parties were represented by counsel ...

In proceedings as serious and complex as these, an unrepresented parent will ordinarily need to possess superior intelligence or education, communication skills, composure, and familiarity with the legal system in order to effectively present his or her case ... Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby threatening to violate both the appellant's and her children's rights.

²⁵ At paras. 77 - 81.

This decision states that an indigent parent does not have an absolute right to state-paid counsel in a protection proceeding. Nonetheless, the complexity and importance of most contested wardship applications, and the limited education and sophistication of most parents involved in these cases, suggest that there will be few cases in which a trial judge is likely to find that there is no right to representation.

It is submitted that in any case in which a judge considers that an unrepresented litigant in a child protection case may have a constitutional right to counsel, the judge has an obligation to raise this issue with the individual. This is an aspect of the judicial duty to ensure that there is a fair trial that accords with the constitutional requirements that it be “in accordance with the principles of fundamental justice.” The individual should normally initially be referred to the local legal aid office.

In practice, it seems, since *G.(J.)*, legal aid offices generally ensure that, if an application is made by an indigent person, some representation will be provided for parents in child protection cases where a child may be removed or kept from parental custody.

Even if the agency is only seeking a supervisory order, leaving the child under parental care, there is a strong argument that the “security of the person” is engaged. These orders are intrusive, involve societal stigma and increase the risk of later apprehension.

As is more fully discussed below, *G.(J.)* can be invoked to establish not only the entitlement to representation, but also to address issues of the adequacy of the compensation provided to ensure that there is “effective representation.”²⁶ If legal aid refuses to provide adequate representation, the judge has the jurisdiction to order that the parent may retain counsel to be paid by the provincial (or territorial) government.

The analysis in *New Brunswick (Minister of Health) v. G.(J.)* deals with child protection proceedings, but it may be relevant for representational issues that arise in a range of proceedings that affect parents and children.

RIGHT OF CHILDREN IN CHILD PROTECTION CASES TO COUNSEL

While the Supreme Court judgment in *New Brunswick (Minister of Health) v. G.(J.)* focused on the constitutional rights of parents to a fair hearing if a state

²⁶ See discussion below of: “Constitutional Rights - Competent and Reasonably Compensated Counsel.”

agency threatens their relationship with their children, the court also appeared to recognize that children have their own constitutional right to “liberty and security of the person,” which may be affected by the child protection process. Although a child’s rights and interests are not the same as those of an adult, some American decisions have recognized that when a child is “old enough to understand the nature of the guardianship proceeding and its effect on him, to have formed considered views about it, and to express those views,” then “due process” requires that the child “be given the opportunity to be heard in a meaningful way.”²⁷ In appropriate cases, this may include the constitutional right of a child to have counsel to present his or her views.

While some provinces, like Ontario and Québec,²⁸ have statutory schemes that provide for individualized assessments to determine the appropriateness of notification and counsel for children in child protection cases, most provinces do not. As a child’s right to “liberty and security of the person” is affected by a protection proceeding, a child with capacity to understand the nature of the proceeding should have notice of the proceeding. In cases where the child has a position that may differ from the parents or agency, there may be a constitutional right to independent counsel to advance that view.²⁹ Since counsel should be independent, and very few children will have the resources on their own to retain counsel, if they are to be represented, their counsel must be paid by the state.

The constitutional argument that, in appropriate cases, a court has the jurisdiction to order that a child have independent legal representation in a child protection case is strengthened by reference to the *United Nations Convention on the Rights of the Child*. Article 12 of the *Convention* provides that a child “shall... be given the opportunity to be heard in any judicial ... proceedings affecting the child, either directly or through a representative.” The Supreme Court of Canada has invoked this *Convention*, and it is clear that it can be used as a tool to assist with the interpretation of the *Charter*.³⁰

In addition to making an order based on the *Charter*, a judge of a superior court (like Ontario’s Family Court) dealing with a child protection matter may invoke the court’s inherent *parens patriae* power to make an order for representation of a child. This can be done on the grounds that such an order is necessary to ensure that the child’s interests are fully protected.³¹

²⁷ *In re Adoption No. 6Z97003 for Montgomery County*, 731 A. 2d 467 (Md. Ct. Spec. App. 1999). See also *Webster v Ryan*, 2001 N.Y. Misc Lexis 264 (Fam. Ct. 2001) on the constitutional right of a child who had been in state care to a “best interests” hearing to determine whether the child could continue to maintain contact with a foster parent with whom the child had developed a parent-like relationship.

²⁸ See Ontario’s *Child and Family Services Act*, R.S.O. 1990, c. 11, section 38; and Québec’s *Youth Protection Act*, section 78. See also New Brunswick *Family Services Act*, S.N.B. 1980, F- 2.2, s. 7(b).

²⁹ This argument was accepted in *Re R.A.M.; Children’s Aid Society of Winnipeg v. A.M.* (1983), 37 R.F.L. (2d) 113, reversed on other grounds 39 R.F.L. (2d) 239 (Man. C.A.).

³⁰ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193.

³¹ See e.g. *H.(S.) v. H.(W.)* (1999), 48 R.F.L. (4th) 305 (Nfld. U.F.C.).

SIBLING ACCESS FOR CHILDREN IN STATE CARE

Some Canadian courts have interpreted child welfare legislation to provide for a limited statutory right for children who are permanent wards of the state to seek a “best interests” determination about the right to enjoy a relationship with their siblings. This is the case even after their relationship to their parents has been legally terminated.³² In situations where there is no statutory right to sibling access, a constitutional argument can be made by on behalf of a child in state care that the child’s “security of the person” (i.e., psychological well-being) requires consideration of whether there it would be in the children’s best interests to have contact with each other. In cases where children have established psychologically meaningful relationships with siblings, the best interests and constitutional arguments in favour of contact might be pursued even after adoption of one or both siblings.

Some American decisions have accepted constitutionally based claims by children in state care for access rights to their siblings. As noted in one American judgment: “children’s relationships with their siblings are the sort of ‘intimate human relationships’ that are afforded ‘a substantial measure of sanctuary from unjustified interference by the state’ ... relationships with ... siblings are even more important [when] ... relationships with ... biological parents are tenuous or non-existent.”³³

If the constitutional right of a child in state care to seek a judicial order for access is to be meaningful, it should include the right to independent legal representation.

HOW FAR CAN *G.(J.)* BE EXTENDED? THE ‘STATE ACTION’ LIMITATION

Section 32 of the *Charter of Rights* provides that the *Charter* applies to the “Parliament and government of Canada” and to the “legislatures and government of each province.” The Supreme Court held in *Retail, Wholesale and Department Store Union v. Dolphin Delivery*³⁴ that the *Charter* is intended to control the “state actions” and cannot be directly invoked to provide relief in “purely private disputes.”³⁵ The Supreme Court has somewhat narrowed the effect of *Dolphin*

³² See *P.(M.A.R.) v. V.(A.)* (1998), 40 R.F.L. (4th) 411 (Ont. Gen. Div.). This decision recognizes that the child protection legislation appears to focus exclusively on the “best interests” of the *child in state care*, the court should also consider the interests of other children should also be considered. A constitutional approach requires consideration of the “security of the person” (i.e. psychological well-being) of each of the siblings.

See also *Children’s Aid Society for Oxford v. Terry M. et al.* (unreported) October 21, 1999, per Schnall J., Ont. Ct. Just., which accepted a statutory argument to allow post-adoption sibling access where one child was a Crown ward.

³³ *Aristotle P. v. Johnson*, 721 F. Supp. 1002, at 1006-07 (U.S.D.C. N.D. Ill 1989).

³⁴ [1986] 2 S.C.R. 573.

³⁵ *British Columbia Government Employees’ Union v. British Columbia*, [1988] 2 S.C.R. 214 at 243.

Delivery in later cases, indicating that “*Charter* values” may be applied in private disputes.³⁶ Still, the doctrine of “state action” may limit the applicability of *G.(J.)* in some family law contexts. Indeed, arguably, a constitutionally based claim to representation can only be made in family law contexts in which there is some form of “state action.”

A child protection proceeding involves a state financed and mandated agency becoming directly involved in the lives of families and children. A child protection proceeding is a clear and obvious situation of “state action.” In its recent decision in *Blencoe v. British Columbia (Human Rights Commission)*, the Supreme Court of Canada indicates that section 7 of the *Charter* is not engaged in every situation in which there is a legal threat to the parent-child relationship - there must be “state action” as opposed to a “purely private dispute.” McLachlin C.J.C. writes:³⁷

The principle that the right to security of the person encompasses serious state-imposed psychological stress has recently been reiterated by this court in *G.(J.)*. At issue in *G.(J.)* was whether relieving a parent of the custody of his or her children restricts a parent’s right to security of the person. Lamer C.J. held that the parental interest in raising one’s children is one of fundamental personal importance. State removal of a child from parental custody thus constitutes direct state interference with the psychological integrity of the parent, amounting to a “gross intrusion” into the private and intimate sphere of the parent-child relationship. Lamer C.J. concluded that section 7 guarantees every parent the right to a fair hearing where the state seeks to obtain custody of their children. However, the former Chief Justice also set boundaries in *G.(J.)* for cases where one’s psychological integrity is infringed upon. He referred to the attempt to delineate such boundaries as “an inexact science.” Not all state interference with an individual’s psychological integrity will engage section 7. Where the psychological integrity of a person is at issue, security of the person is restricted to “serious state-imposed psychological stress.” The words “serious state-imposed psychological stress” delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be *state imposed*, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be *serious*. Not all forms of psychological prejudice caused by government will lead to automatic section 7 violations.

In *G.(J.)*, Lamer C.J. found direct state interference with the psychological integrity of the parent. He described the government action in that case as “direct state interference with the parent-child relationship.” Later, Lamer C.J. referred to a child custody application as “an example of state action which *directly engages* the justice system and its administration.” He stressed that not every state

³⁶ See *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835.

³⁷ [2000] 2 S.C.R. 307 at paras. 56 -57. Emphasis added by Supreme Court. References in quote omitted.

action which interferes with the parent-child relationship would have triggered section 7 *Charter* interests. Chief Justice McLachlin in *Blencoe* writes:³⁸

Stress, anxiety and stigma may arise from any criminal trial, human rights allegation, or even a civil action, regardless of whether the trial or process occurs within a reasonable time.....It would be inappropriate to hold government accountable for harms that are brought about by third parties who are not in any sense acting as agents of the state.

The articulation of the “state action” doctrine and the related notion of the “public-private” dichotomy have been criticized as favoring the existing social and economic hierarchy. In particular, in the context of spousal separation, the doctrine has been criticized as tending to favor men, who generally have greater economic resources and hence are more likely to be able to afford to retain counsel.³⁹ However, unless the Supreme Court of Canada overrules a long line of precedents, those making *Charter* based claims for legal representation will have to satisfy the court that there is some “state action.”

There are already a number of reported cases in the divorce and custody context in which Canadian courts have dismissed claims for representation on the basis that the actions do not raise issues of “state action.”⁴⁰ However, as the Supreme Court recognizes, the exact delineation of “state action” is “an inexact science.” There are situations in which arguments can be made for representation even if the state is not directly involved as a party to the litigation.

RIGHTS OF PARENTS IN ADOPTION CASES

While the focus of the Supreme Court in *G.(J.)* was on the rights of parents and children in the context of a child protection hearing, similar interests arise in an adoption proceeding. Even if an adoption does not involve a state-funded child welfare agency, the adoption will result in a court action that will permanently sever the relationship between a biological parent and the child. In effect, an adoption entails not merely adjudication of a dispute between private individuals, but also exercise of a legislative mandate for changing the legal status of a child. In this sense, the action of the judge in making an adoption order is a form of “state action.”

The American courts have been unwilling to recognize constitutional rights in the context of “private” disputes between separated parents. However, they have held constitutionally protected due process rights may arise in an adoption proceeding in which one biological parent seeks to have a stepparent adopt the child and

³⁸ [2000] 2 S.C.R. 307 at para. 59.

³⁹ See e.g. Lessard, “The Idea of the Private: A Discussion of the State Action Doctrine and the Separate Sphere Ideology” (1986) 10 Dal. L.J. 107; Hutchison and Petter, “Private Rights/Public Wrongs: The Liberal Lie of the *Charter*” (1988) 38 U. Toronto L.J. 278; and Fudge, “The Public/Private Distinction: The Use of *Charter* Litigation to Further Feminist Struggles” (1987) 25 Osgoode Hall L.J. 485.

⁴⁰ See e.g. *Miltenberger v. Braaten*, [2000] S.J. 599 (Sask. Q.B.); and *Ryan v. Ryan*, [2000] N.S.J. 13 (C.A.).

thereby sever the child's link to the other biological parent. As recognized by the United States Supreme Court in its 1996 decision in *M.L.B. v. M.L.J.*, the parental interest involved in an adoption is a "commanding one ...[because] unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child." Adoption destroys "family bonds" and is similar in effect to a termination of parental rights as part of a child protection proceeding.⁴¹

In a 1999 Florida decision, a court in a contested stepparent adoption held that the indigent biological father faced the termination of parental rights as a result of "state action ... vested in the judicial branch of ... government" and hence is constitutionally entitled to counsel under the "due process clause" of the *United States Constitution*.⁴²

The weight of American jurisprudence on adoption and the analysis in Canadian child protection cases⁴³ suggest that an indigent parent who is opposing the adoption of his child will have a very strong constitutional claim for the right to legal representation under section 7 of the *Charter*.

PATERNITY PROCEEDINGS & RIGHTS

Historically, the law discriminated against children born out of wedlock ("illegitimate children") in a range of ways which made it difficult to establish a legal link between these children and their fathers. Some of the early decisions under the *Charter* ruled that blanket exclusion of fathers of unwed children from the category of "parents" whose consent is required for adoption violated section 15 of the *Charter*.⁴⁴ There are, however, still some rights in regard to the registration of birth and the naming of a child that the legislature can validly grant exclusively to the mother, as the "parent, who by biological necessity is always present at birth."⁴⁵

American cases have accepted that fathers of children born out of wedlock should not automatically be excluded from having a relationship with their children.⁴⁶

⁴¹ 117 S. Ct. 555 (1996). The court held that it was a violation of the Constitution to require an indigent mother to pay a transcript fee before appealing an adoption order granted to the child's father and his new wife.

⁴² *O.A.H. v. R.L.A.*, 712 S. (2d) 4 (1999 Fla. 2nd Dist). This decision was followed in *Re H.B.S.C.* 12 P. 3d 916 (Kan. C.A. 2000), in which it was held that an indigent biological father whose child was adopted at trial had the constitutional right to counsel provided by the state at the appeal hearing.

⁴³ See also *D.(S.J.) v. S.(J.)* (2001), 15 R.F.L. (5th) 323 (B.C.C.A.); although this was not a *Charter* case, the British Columbia Court of Appeal refused to make an order that a mother appealing an adoption decision provide security for costs, distinguishing this from a case dealing with custody and support issues by that in "the granting of an adoption the result is even more final than a dispute involving custody or access."

⁴⁴ See e.g. *MacVicar v. British Columbia Superintendent of Family and Child Services* (1986), 34 D.L.R. (4th) 488 (B.C.S.C.).

⁴⁵ *Kreklewetz v. Scopel* (2001), 52 O.R. (3d) 172 at 180 (Sup. Ct.) per Greer J, quoting with approval from *T.(D.W.) v. British Columbia (Attorney General)* (1999), 47 R.F.L. (4th) 79 at 89 (B.C.S.C.) per Colver J..

⁴⁶ *Stanley v. Illinois*, 92 S. Ct. 1208 (1972).

However, these cases have also recognized that fathers and mothers are not always similarly situated and some differences in treatment may be constitutionally justified. If a man takes no steps to establish a relationship with a child after the child is born, his rights may be extinguished.⁴⁷ A law creating a presumption that a mother's husband is the father of her children is constitutionally valid.⁴⁸

In the Canadian context, a 1989 Ontario decision upheld the constitutional validity of legislation that did not require consent to adoption from a man who has taken no steps to establish a relationship with a child after its birth. This was held to apply even if the man has no knowledge that the child has been born, which suggests that there are no constitutional interests involved in such a proceeding.⁴⁹ However, since *G.(J.)* the precedential value of this decision must be reassessed.

It may be argued under section 7 of the *Charter* that proceedings that raise issues of paternity must be conducted in accordance with the "principles of fundamental justice." These proceedings affect not only economic interests, but also create a profoundly important psychological bond between a parent and child that affects the "security of the person." Further, as with adoption, the court is not merely resolving a dispute between parties, but acting as an agent of the state to permanently change the status of the relationship between the child and the putative father. Until now, this type of argument has generally not been received sympathetically by the Canadian courts.⁵⁰ Nevertheless, the reported cases are all at least a few years old, and this issue may have to be revisited in light of the 1999 Supreme Court of Canada judgment in *New Brunswick (Minister of Health) v. G.(J.)*.⁵¹

It may now be argued that reasonable efforts have to be made to identify and locate a father before an adoption is completed.⁵² There is also a strong argument

⁴⁷ *Lehr v. Robertson*, 460 U.S. 248, 103 S.Ct. 2985 (1983).

⁴⁸ *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333 (1989). This case offers several conflicting opinions, however it "appears that a majority of ...the Supreme Court will require a male asserting biological parenthood of a child some form of hearing to determine whether the father should be allowed visitation rights and opportunities to establish a relationship with the child." Rotunda & Nowak, *Treatise on Constitutional Law: Substance and Procedure* (3rd edit) (Westlaw online), chapter 17.

⁴⁹ *S.(C.E.) v. Children's Aid Society of Metropolitan Toronto* (1988), 64 O.R. (2d) 311 (Div. Ct.).

⁵⁰ *C.(M.S.) v. L.(R.)* (1997), 28 R.F.L. (4th) 262 (B.C.S.C.), a putative father was seeking a declaration of paternity claiming that he was the father of a ten-month old child born to a married woman. The mother refused to consent to blood tests. In a short and not very clear judgment Brandreth-Gibbs M. declined to order blood tests, observing the child had no independent representation and that the child's interests under subsections 7 and 8 of the *Charter* were engaged.

⁵¹ *T.(D.W.) v. British Columbia (Attorney General)* (1999), 47 R.F.L. (4th) 79 (B.C.S.C.) appeared to accept that a putative father has a constitutionally significant interest in his child's birth registration, though holding that the process of appeal in the legislation satisfied the *Charter*.

⁵² See *Re P.(N.)* (2001), 15 R.F.L. (5th) 151 (Ont. Fam. Ct.), citing the *Charter* and *G.(J.)* to invalidate a Crown wardship and adoption placement because the Children's Aid Society failed to make adequate efforts to locate and notify the putative father of a child born out of wedlock of the wardship application.

that under section 7 of the *Charter*, an indigent litigant should have the right to have the state pay for blood tests to determine with a degree of certainty that there is (or is not) a parental relationship.⁵³ Further, if the issues are complex, the indigent putative father should have the right to representation paid by the state.

LEGAL REPRESENTATION FOR PARENTS IN CUSTODY AND ACCESS PROCEEDINGS

As discussed above, the primary focus of the *Charter of Rights* is the protection of individuals from unfair or discriminatory treatment *by the state*. Hence, the Supreme Court of Canada in *Dolphin Delivery* ruled that the *Charter* applies to government action, and has no direct effect on “purely private litigation.”⁵⁴ However, the court has acknowledged that “*Charter* values” may affect how the courts interpret and apply the common law and legislation to private disputes. Further, the court has accepted that *legislation* which applies to private disputes is a form of “government action” that is subject to *Charter* scrutiny.

In the context of custody and access disputes between parents, L’Heureux-Dubé J. in *Young v. Young* argued that the *Charter* could not be invoked to affect how the “best interests” test is applied in disputes between parents as the *Charter* has no application to such disputes, which are “essentially private in nature.”⁵⁵ While the majority of the Supreme Court of Canada in *Young v. Young* did not rule on whether the *Charter* applies to proceedings under the *Divorce Act*, it is clear that the courts will not allow the *Charter* to be used in a dispute between parents in a

For a recent British Columbia case that involves a man who was unaware that a girlfriend had given birth, and later found out and tried to prevent the adoption, see *Re British Columbia Birth Registration No. 99-00733*, [2000] B.C.J. 251 (C.A.). The case did not involve a direct challenge to the constitutional validity of the legislation. Although the father in this particular case did not succeed in gaining custody or preventing the adoption, Prowse J.A. did acknowledge that had “all other factors been more or less equal, it would have been appropriate to look to the biological factor as the decisive factor.”

⁵³ The American courts have held the right of an indigent putative father to have the state pay for blood tests to (dis)prove paternity: *Little v. Streater*, 452 U.S.1, 101 S.Ct. 2202. For an American case accepting the argument that an indigent putative father has the right to counsel, see *Corra v. Coll*, 451 A 2d 480 (Penn. 1982).

There may be also be section 7 issues that arise in interjurisdictional child support proceedings where an application is being made to confirm a provisional order made in another jurisdiction, if the putative father is unable to adequately challenge evidence adduced by an applicant in proceedings commenced in another jurisdiction. With the possibility of more accurate blood tests, this issue may be of limited practical significance now, provided that it is accepted that the state may be obliged to pay for blood tests for an indigent parent.

In *Gilliland v. Walker* (1985), 19 C.R.R. 340 (Ont. Prov. Ct.), Abbey J. accepted such an argument in an interjurisdictional paternity proceeding where the mother presented her evidence in Michigan and the father defended the case in Ontario. While the analysis in the decision is problematic, since the judge relied on the economic interests of the putative father to invoke section 7, the outcome may be defended on the basis that the dispute affected the man’s “security of the person.” For a case decided before *New Brunswick (Minister of Health) v. G.(J.)* rejecting this type of argument, see *D.(T.A.) v. S.(P.C.)* (1995), 13 R.F.L. (4th) 281 (Ont. Prov. Ct.). In *J.C. v. D.S.* (1988), 18 R.F.L. (3d) 40 (Sask. U.F.C.) and *P.(L.) v. E.(G.)* (1990), 28 R.F.L. (3d) 25 (Alta. Prov. Ct.), the courts appeared to accept that section 7 applied to this type of proceeding, but that the confirmation process satisfied the principles of fundamental justice.

⁵⁴ [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174. See discussion above of “How Far Can *G.(J.)* Be Extended? The ‘State Action’ Limitation.”

⁵⁵ (1993), 49 R.F.L. (3d) 117 (S.C.C.).

fashion that seems contrary to the best interests of a child.⁵⁶ On the other hand, it would appear that even L’Heureux-Dubé J. might allow the *Charter* to be used to promote the best interests of children in disputes that do not directly involve the state as a party, especially if there are issues of inequality and discrimination that give rise to section 15 concerns.⁵⁷ Thus, it may be argued that in a parental custody dispute, an indigent parent may have a constitutional claim to state provided counsel to protect “security of the person,” especially if the other parent has a lawyer. Of course under *G.(J.)*, an order will only be made in a specific case if the court is satisfied that the case raises complex issues which an indigent parent cannot adequately deal with in the absence of counsel.

In *Stewart v. Stewart*, a 1996 Ontario parental custody dispute, the judge invoked the *Charter* to order that the government provide counsel to a mother on social assistance who had been denied Legal Aid. Stong J concluded:⁵⁸

It is clear to this court that [the mother on social assistance] ... is in need of counsel because she would be unable to present her case appropriately and when confronted by competent counsel, would be at a decided disadvantage in her ability to cross-examine ... as well as to present her own case, in addition to any arguments in law that would emanate from this subject matter. There is no more serious subject matter than that which reflects the well being and the best interests of the child involved. For a court to have a complete picture, it is important that both parties in this case be able to get full disclosure and give full evidence of their respective positions and have those respective positions presently competently and completely to the court.

Although this decision predated the Supreme Court decision in *G.(J.)*, it raises a similar theme. The court uses the *Charter* not only to protect parental rights, but also to ensure that a process is adopted that provides the court with information to make a sound decision about the child’s security of the person.⁵⁹

A more recent Saskatchewan decision, *Miltenberger v. Braaten*, runs contrary to *Stewart*. Justice Ryan-Froslic refused to order that counsel be provided for a

⁵⁶ In *Young v. Young*, McLachlin J. focused on the importance of the best interests of the child test (1993), 49 R.F.L. (3d) 117, at para. 27: “The [parental] guarantees of religious freedom and expressive freedom in the *Charter* do not protect conduct which violates the best interests of the child test.”

⁵⁷ See concurring opinion of L’Heureux-Dubé J. in *New Brunswick (Minister of Health) v. G.(J.)*, [1999] S.C.J. 47 where she invoked section 15 arguments to buttress the section 7 claims of indigent parents, recognizing that they are often single mothers.

⁵⁸ *Stewart v. Stewart*, (Nov. 27, 1996) (unreported Doc. Whitby 74557/96 Ont. Gen. Div.) per Stong J, quoted but not followed in *Fowler v. Fowler* (1997), 32 R.F.L. (4th) 426 at 428 (Ont. Gen. Div), per Vogelsang J. Fowler can be distinguished since it was a case involving a support application. As discussed above in the context of child protection proceedings, if an indigent parent has a potential constitutional right to counsel paid by the state, the judge’s duty to ensure a fair trial may require that the judge raise this issue with an unrepresented indigent litigant. In an appropriate case this might require notice to the government of an appointment of *amicus curiae* to investigate and make submissions before the issue is resolved, though this type of elaborate process will not ordinarily be required.

⁵⁹ There is also an argument that, in appropriate cases a child should have a constitutional right to participate in a custody or access dispute, perhaps through counsel. This argument can only be raised if the child has the capacity to meaningfully participate in the proceedings and instruct counsel.

mother in a custody dispute with her former husband.⁶⁰ The judge distinguished *G.(J.)* as a case involving state action, emphasizing that this was “a court action between private citizens to determine custody of their children” which gave rise to “no state action threatening the security of the [mother’s]...person.” The judge was also concerned about making an order “to require government to spend limited resources in providing legal counsel for private individuals.” The judge devoted most of the relatively brief decision to summarizing the facts, suggesting that the mother’s claim to custody was very weak. The mother, who represented herself, had not even established that she was indigent.⁶¹ To this point, the weight of judicial authority in Canada has been to reject claims of one parent for a constitutional right to representation in a dispute with the other parent. These cases, however, have not involved the most sympathetic fact situations.

A claim for a constitutional right to counsel will be stronger if there are allegations of physical or sexual violence against a spouse.⁶² Allegations of child abuse may also strengthen the claim, since the child’s physical “security of the person” may be directly at issue in such a family law proceeding.⁶³ The claim will also be stronger if one indigent parent has received representation from legal aid. That type of state support for one parent may be sufficient to entitle the other indigent parent to claim that there is state involvement creating a *Charter* right to representation.

The constitutional claim for representation may also be stronger if an indigent parent is facing an allegation that he or she physically or sexually abused the child, and is faced with possible termination of access. Societal stigma and the threat to the parent-child relationship make this type of proceeding similar to a child protection proceeding. Also, the issues are likely to be complex. This makes legal counsel necessary to ensure a fair hearing.

Probably the strongest case for a constitutional right to representation is by an indigent parent in a dispute with the other parent in situations in which the other parent has obtained government assistance to invoke the international *Hague Convention on Civil Aspects of Child Abduction*. Under that *Convention*, a parent can apply to have a child returned to the jurisdiction in which the child was “habitually resident.” In particular, a parent whose child has been removed from the jurisdiction of habitual residence can use the *Convention* to ask the

⁶⁰ [2000] S.J. 599 (Q.B., Fam. L. Div.). See also *C.A.S. of London v. T.C.*, [1999] O.J. 5506 (Sup. Ct.).

⁶¹ In *Ryan v. Ryan*, [2000] N.S.J. 13 (C.A.) the court refused to invoke section 7 of the *Charter* to appoint counsel for an indigent parent in a divorce case. One reason the court gave was that (at para. 20): “The dispute between the parties in this case is a private one, to which the state is not joined.” However, the case primarily dealt with economic issues, and may be distinguishable from a serious dispute about custody or access. See also *Mills v. Hardy* (2000), 13 R.F.L. (5th) 150 (N.S.C.A.).

⁶² In some cases, a section 15 *Charter* argument may reinforce section 7 arguments. In its decision in *R v. Mills*, [1999] S.C.J. 68 the Supreme Court of Canada seems to give some constitutional recognition to claims by women and children who are victims of (alleged) acts of violence for protection in the judicial process.

⁶³ See the American case of *Flores v. Flores*, 598 P. 2d 893 (1979) where a legal aid clinic represented one parent in a custody dispute raising complex legal issues; the court held that the other parent had a constitutional right to state paid counsel.

government, through its “Central Authority” (Ministry of the Attorney General), to secure the return of a child who has been removed. The state is more clearly involved in this type of proceeding than an ordinary dispute between the parents.⁶⁴

This type of case may, for example, arise when one parent (typically a mother) decides to leave the marital home with the child to escape from an (allegedly) abusive situation, and flees to another country. The mother may come back to Canada in flight from an abusive marriage in another country, seeking refuge and support in her own country of origin (Canada). She may do so even though the child that she is bringing with her may have spent most or all of his or her life outside of Canada. If her departure was in violation of the custody rights of the other parent (the father), under the *Hague Convention*, that parent may request that the government “Central Authority” in the province to which the mother and child have fled enforce his custody rights, and have the child returned to the original jurisdiction. In this situation, the parent who is resisting the claim to return the child can assert that the government’s action of seeking to enforce the *Hague Convention* would force the child to return would pose a serious risk of harm (i.e. to the “life and security of the person”) both to herself and the child. The *Hague Convention* itself has a provision to allow a court to refuse to order the return of the child if it can be shown that there would be a “grave risk” of harm if the child were returned.⁶⁵ Establishing this risk will usually require the assistance of counsel, and an indigent parent would have a strong constitutionally based claim to an order for representation.

As discussed above, in the alternative or in addition to a constitutional argument, in a custody dispute between parents, a superior court judge who is inclined to direct that representation should be provided to an indigent parent may be persuaded to invoke the court’s *parens patriae* jurisdiction. A judge is empowered to do so on the basis that representation is needed to ensure a full judicial exploration of the child’s “best interests.”⁶⁶

RIGHT OF CHILDREN TO COUNSEL IN PARENTAL CUSTODY & ACCESS DISPUTES

Some provinces, like the Ontario Office of the Children’s Lawyer, have schemes that provide for an individualized assessment to determine whether it is appropriate to have counsel appointed to represent the interests of children in parental custody disputes. Most provinces do not. In jurisdictions without such programs, it may be argued that the child has a constitutional right to

⁶⁴ This point is also made by D.A.R. Thompson, “No Longer ‘Anything But the Charter’: The New ABC’s of the Charter,” National Judicial Institute Family Law Program, Halifax, February 16, 2001, at p. 40.

⁶⁵ *Pollastro v. Pollastro* (1999), 43 O.R. (3d) 485 (C.A.).

⁶⁶ *I.N. v. Newfoundland (Legal Aid Commission)*, [2000] N.J. 312 (Nfld. U.F.C.).

representation. As with children in protection cases, arguments can be raised to support this right which cite the *U.N. Convention on the Rights of the Child* as a guide to interpreting the *Charter*.

Arguably, since the child is not a party to the action but is directly affected by an order, the child's "security of the person" is threatened by "state action." However, a court is only likely to accept this type of argument if the child is competent and expressing his or her own views. If it appears that a parent is merely advancing this type of claim to advance his or her own position, the court is unlikely to be sympathetic to this argument.⁶⁷ As counsel should be independent, and very few children will have the resources on their own to retain counsel, if they are to be represented, there must be counsel paid by the state.

In addition, or in the alternative to making an order for child representation based on the *Charter*, a judge of a superior court dealing with a parental custody or access dispute could invoke the court's inherent *parens patriae* power, on the grounds that such an order is necessary to ensure that the child's interests are fully protected.⁶⁸

VICTIMS OF DOMESTIC VIOLENCE

Although there do not appear to be any reported Canadian cases making this argument, it may be that indigent victims of alleged domestic violence who are seeking civil remedies to gain protection, for example by means of a restraining order, have a constitutionally based claim for representation. This may be a situation in which section 15 of the *Charter*, and concerns about the protection of vulnerable women, may support a section 7 based claim.⁶⁹

There is no doubt that individuals who are facing domestic violence face a threat to their security of the person, and frequently to their life as well. The emotional and legal complexity of these cases for victims can make representation essential if an order is to be secured to protect the victim. There is an argument that in this particularly perilous circumstance, the state's failure to provide needed assistance

⁶⁷ See e.g. *Boukema v. Boukema*, [1997] O.J. No. 2903 (Gen. Div.) for a case where a parent retained counsel for a child, and there was doubt as to the independence of the views of the child and the role of counsel retained on behalf of the child.

⁶⁸ See e.g. *H.(S.) v. H.(W.)* (1999), 48 R.F.L. (4th) 305 (Nfld. U.F.C.). Cook J. invoked the court's *parens patriae* jurisdiction to appoint counsel for a 4-and-a-half-year-old girl in a bitterly contested custody case raising sexual abuse allegations. The application for appointment of independent counsel for the child was made by the mother.

⁶⁹ In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, the Supreme Court of Canada held that the failure of a provincial medical care scheme to provide sign language interpreters for the deaf was violative of the equality rights of deaf persons under section 15 of the *Charter*. As a vulnerable and disadvantaged group, victims of domestic abuse may be able to establish that denial of legal representation to them is similarly violative of their equality rights.

to secure a statutory right is a form of state action.⁷⁰ As some American commentators and judges argue, in such circumstances the state's inaction to support a victim may be a form of action.⁷¹

Even if there is technically no constitutionally based right to representation, it is clear that victims of domestic violence are among the most vulnerable in society and require access to legal and other services to protect themselves and their children.

RESPONDENTS IN SUPPORT ENFORCEMENT PROCEEDINGS

While the courts have been willing to invoke the *Charter* to define *who* should be able to claim spousal rights, they have generally resisted claims as to *what* those economic rights and obligations should be.⁷² It is clear that section 7 of the *Charter* does *not* protect purely economic interests as aspects of “liberty and security of the person.”⁷³

In *Fowler v. Fowler*, Vogelsang J. rejected a constitutionally based argument by an indigent party in a spousal support and marital property claim for counsel paid by the state.⁷⁴ The court explicitly rejected a claim that section 15 of the *Charter* was violated, and also appeared to reject the argument under section 7 that the economic interests at stake involved a threat to the “security of the person” of the applicant. While the welfare and interests of an applicant (or respondent) are undoubtedly affected by a spousal support application, these economic interests alone do not justify constitutional protection under section 7 of the *Charter*.⁷⁵ This is not to suggest that counsel are not vitally important for support applications or should not be provided through the legal aid plan, but only to argue that there is no constitutional right to state-appointed counsel for indigent applicants for spousal or child support.

There may, however, be a constitutionally based claim for representation for a respondent in some support enforcement proceedings. In all Canadian

⁷⁰ In its recent decision in *R. v. Mills*, [1999] S.C.J. 68, the Supreme Court of Canada seems to give some constitutional recognition to claims by women and children who are victims of (alleged) acts of violence for protection in the judicial process. See also *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519; and *Jane Doe v. Metropolitan Toronto Police* (1998), 39 O.R. (3d) 487 (H.C.).

⁷¹ For an American commentator making this argument, see Lisa Martin, “Providing Equal Justice for the Domestic Violence Victim: Due process and the Victim’s Right to Counsel” (1999) 34 *Gonzaga L. Rev.* 329.

⁷² *M. v. H.*, [1999] 2 S.C.R. 3 (invoking section 15 of the *Charter* to allow same-sex partner to seek “spousal support”).

⁷³ Similarly, family law legislation is premised on creating obligations that uniquely apply to those going through family breakdown, and it is very difficult to invoke section 15 of the *Charter* to argue that treating those individuals differently from those whose families are not in this situation is unfair or unconstitutional. *Souliere v. LeClair* (1998), 38 R.F.L. (4th) 68 (Ont. Gen. Div.); *Michie v. Michie* (1997), 36 R.F.L. (4th) 90 (Sask. Q.B.).

⁷⁴ (1997), 32 R.F.L. (4th) 426 (Ont. Gen. Div), per Vogelsang J..

⁷⁵ See e.g. *Wilson v. British Columbia (Medical Services Commission)* (1988), 53 D.L.R. (4th) 171 (B.C.C.A.), leave to appeal refused, [1988] 2 S.C.R. viii; and *Conrad v. Halifax* (1993), 124 N.S.R. (2d) 251 (S.C.), *aff’d* on other grounds, 130 N.S.R. (2d) 305 (C.A.), leave to appeal to S.C.C. refused, 178 N.S.R. 396.

jurisdictions there is a government agency that has a role in enforcement of child and spousal support orders. The state clearly has a right to assist with the enforcement of child and spousal support obligations, and to the extent that the enforcement process only involves the seizure of property or the attachment of income, the reported caselaw in the past decade has held that there are no *Charter* issues.⁷⁶ However, if the enforcement process involves threats to “liberty and security of the person,” section 7 of the *Charter* requires that this must be done “in accordance with the principles of fundamental justice.”

The courts have been prepared to invoke section 7 of the *Charter* in support enforcement proceedings when there is the prospect of the defaulting payor being sent to jail for contempt of court. This has ensured that minimum procedural protections are provided to a defaulting debtor, such as the right to notice, the right to a hearing and the right to adequately challenge evidence through cross-examination.⁷⁷ However, cases reported in the past decade have generally accepted that present processes for invoking the contempt power are “fair and balanced” and comply with section 7.⁷⁸ It is, for example, not a violation of the principles of fundamental justice to place an onus on the defaulting debtor to show why he cannot make support payments. The process is civil not criminal, and the debtor is in by far the best position to adduce evidence.⁷⁹

Although there are no reported Canadian cases, there is a strong argument that an indigent debtor has a constitutional right to counsel before a court makes a finding that might result in imprisonment for contempt of court at a default hearing. This right will only result in representation actually being ordered if the issues are of sufficient complexity that the respondent cannot adequately represent himself. In many cases, the issues that a debtor is likely to raise are relatively straightforward and relate to his own circumstances, such as being unemployed. In some cases, however, a debtor may be raising more complex issues, such as concerning the validity or amount of the obligation, that may justify an order for assistance of counsel.

CONSTITUTIONAL RIGHTS - EFFECTIVE AND REASONABLY COMPENSATED COUNSEL

⁷⁶ See e.g. *Millar v. Millar*, [2000] A.J. 338 (Alta. C.A.) rejecting an argument that garnishment of employment income and unemployment insurance benefits to satisfy support obligations violated the *Charter*. The court concluded that it was “doubtful” that section 8 of the *Charter* had any applicability to the seizure of funds, and in any event held that with the notice and judicial control provisions, the entire process was “reasonable” and accords with the principles of fundamental justice. See also *J.C. v. D.S.* (1988), 18 R.F.L. (3d) 40 (Sask. U.F.C.). Some early *Charter* decisions were prepared to invoke the *Charter* to protect purely economic interests in the family law context (see e.g. *Gilliland v. Walker* (1985), 19 C.R.R. 340 (Ont. Prov. Ct.)), but they must be regarded as overruled.

⁷⁷ See e.g. *Ontario (Director of Support & Custody Enforcement) v. Levenson* (1990), 25 A.C.W.S. 515 (Ont. Prov. Ct.).

⁷⁸ See e.g. *Mancuso v. Mancuso* (1991), 35 R.F.L. (3d) 265 (Ont. Prov. Ct.); *Sen v. Sen* (1993), 45 R.F.L. (3d) 351 (Man. Q.B.).

⁷⁹ See e.g. *Klein v. Klein* (Sask. Q.B.) McIntyre J., 29 June 1987 (unreported), discussed in *J.C. v. D.S.* (1988), 18 R.F.L. (3d) 40 (Sask. U.F.C.).

An individual involved in a case where there is a constitutionally recognized entitlement to counsel in order to ensure a fair trial has a right not just to have a lawyer appear in court, but rather to “reasonably effective representation.”

Criminal law cases in Canada and the United States indicate that an aspect of ensuring that counsel is “competent” or “effective” include a determination that counsel is being “reasonably remunerated.”⁸⁰

A British Columbia case clearly demonstrates that judges have a constitutionally mandated role in ensuring that representation for indigent parents in child protection cases is adequate. The case also shows that there is an onus on a parent (or counsel) seeking a court order for representation to demonstrate that the representation which the legal aid plan will provide is inadequate.

In *Walton v. Simpson* a mother of three children was trying to regain custody of her three children, who had been apprehended after a fourth child was killed by the woman’s common law husband. The case was high profile and complex, with a five week trial planned. A very experienced family law counsel was prepared to represent the mother at the legal aid rate of \$72 per hour (less than half his regular rate), but felt that he could not adequately prepare within the approximately 125 hours for preparation time that legal aid was prepared to guarantee. Accordingly, counsel representing the mother sought an order that he be appointed by the court without any restriction on preparation time, at the tariff rate. Justice Meiklem accepted that he had jurisdiction under section 7 of the *Charter* to make the order sought, but felt that counsel had not established through “any independent or expert opinions” that the legal aid time cap would not allow adequate preparation. Further, he held that counsel had not established that the Legal Services Society would not exercise its discretion to increase the maximum if reasonably required. After discussing the Supreme Court of Canada decision in *G.(J.)*, the judge wrote:⁸¹

The applicant has the burden of establishing a *Charter* breach on a balance of probabilities. That would be achieved in this case by establishing that the cap on preparation will probably impede the effectiveness of counsel to the extent that the hearing will be rendered unfair due to the lack of adequate representation.

I do not accept the argument advanced by the Attorney General that, as a matter of principle, if there is legal aid coverage, and therefore counsel available, that is the end of the inquiry. *There is obviously some minimum threshold level of funding required to make the provision of counsel meaningful and effective to ensure the fairness of the hearing.* For example, if there was no funding for preparation in a case which

⁸⁰ See e.g. *R. v. Rockwood* (1989), 49 C.C.C. (3d) 129 (N.S.C.A.); and *Strickland v. Washington*, 104 S.Ct. 2052 (1984).

⁸¹ 2000 B.C.S.C. 758, at paras. 13 -18 (emphasis added).

required extensive preparation, providing counsel at the hearing alone would be perfunctory and probably would not ensure fairness.....

The only evidence before me on the question of the impact of the funding formula for preparation on the fairness of the hearing is the opinion of Mr. Cluff [counsel for the mother] as expressed to the Legal Services Society. That is entitled to some weight because of his seniority and his familiarity with the case, but it is nevertheless a subjective opinion put forward in negotiation, and is a tenuous basis on which to find a *Charter* breach established.

The court dismissed the mother's application, and a legal aid staff lawyer took over her representation.⁸² This decision establishes the principle that the courts have a role in ensuring that representation for an indigent parent is adequate, but also illustrates a reluctance on the part of judges to overturn a decision by legal aid or government officials about how representation is to be provided.

Walton v. Simpson and other cases illustrate that the "right to counsel" embodied in section 7 of the *Charter* is not absolute.⁸³ It is the right of an indigent person to "competent" or "effective" legal representation⁸⁴ by a lawyer paid by the state, but independent of state influence in how a case is handled. This right may be satisfied by having a legal aid clinic lawyer.⁸⁵

There are a number of situations in which legal aid plans provide a certificate for family law matters that is clearly *not* sufficient for the amount of time required to do the work. This is, for example, the situation in Ontario, where an initial 2 hour certificate is given in to alleged victims in domestic violence cases to obtain an interim restraining order. This ordinarily requires counsel to meet the client, prepare and attend court at least twice, and reasonably takes at least five hours. *If, for example* it is determined that indigent victims of domestic violence have a right under section 7 of the *Charter*, counsel could raise the issue of the inadequacy of the government funding provided for this purpose.

CONCLUSION: THE *CHARTER* AND FAMILY LAW CASES

⁸² "Lawyer loses bid for more legal aid funding in high profile child custody case," *Lawyers Weekly*, June 9, 2000.

⁸³ If an indigent individual is given access to legal aid, and chooses to dismiss counsel or appear unrepresented, there is no violation of constitutional rights. However, where a parent with a constitutional right to representation dismisses counsel before a child protection hearing, a judge should normally grant an adjournment; see *F.B. v. S.G.*, [2001] O.J. 1586 (Sup. Ct.) per Himel J..

⁸⁴ The courts generally presume that counsel is "competent." However, in cases in which it is clear that counsel (whether provided by a court order or otherwise) is clearly incompetent, this may be a ground for ordering a new trial, with new counsel. See e.g. *R. v. B. (G.D.)* (2000), 32 C.R. (5th) 207 (S.C.C.) (criminal case establishing standard for "effective representation" - onus on individual to establish that counsel did not exercise "reasonable professional judgment"); and *In Re Cory Stephens*, 12 P. 3d 537, 2000 Ore. App. Lexis 1694 (Ore. C.A. 2000) (incompetent counsel for father in hearing for termination of parental rights results in new trial).

⁸⁵ A judge will generally not appoint specific counsel for an individual. *R. v. McKibbin* (1988), 45 C.C.C. (3d) 334, 31 O.A.C. 10 (C.A.); *Mills v. Hardy* (2000), 13 R.F.L. (5th) 150 (N.S.C.A.). However, when a parent is a minor (or a representation order is made for a child) it may be appropriate to designate that a specific person or office provide representation, such as the Office of the Children's Lawyer in Ontario; see *F.B. v. S.G.*, [2001] O.J. 1586 (Sup. Ct.).

Canada is now going through a slow process of constitutionalizing family law. Courts are invoking the *Charter* to extend *substantive rights* to same-sex partners and common law opposite-sex partners. While politicians have been unwilling to deal with the contentious issues related to the definition of the family, the courts are ensuring that family law accords with fundamental notions of “human dignity” and is not discriminatory.⁸⁶

The Supreme Court of Canada decision in *G.(J.)* also reveals that the courts can use the *Charter* to ensure that *the process* for resolving family law disputes is fair. This case establishes that indigent parents in child protection proceedings have a constitutional right to legal representation, as, without representation, the process will be unfair. Where a parent is unrepresented, the court may not have the information needed to make the best decision about the future of the child. Legal representation is needed to ensure that the threat to the “security of the person” of parents and children is dealt with in a fashion that “accords with the principles fundamental justice.”

Arguments can be made to extend *G.(J.)* to other family law contexts. As discussed in this paper, there are practical and jurisprudential challenges in making these arguments. Recently the courts have been taking a narrower view of the *Charter*. Progress through the courts in seeking to protect vitally important familial and personal rights is likely to be incremental and uneven. It would be preferable if those responsible for legal aid ensured that adequate resources are available to ensure that justice is done in family law proceedings, rather than forcing those who are among the most vulnerable in our society to try to secure the right to legal representation through the courts. However, at present it seems that these resources will not be forthcoming, and there are likely to be further challenges in the courts. At least in some of the cases that raise a constitutional claim to representation, the applicants are likely to succeed, as the courts have signaled a willingness to use the *Charter* to protect the vulnerable and promote the interests of children.

⁸⁶ See *M. v. H.*, [1999] 2 S.C.R. 3 (rights of same sex partners). *Walsh v. Bona*, [2000] N.S.J. 117, 186 D.L.R. (4th) 50 (N.S.C.A.), leave to appeal to S.C.C. granted Feb. 15, 2001, [2000] S.C.C.A. 517.

Droit constitutionnel à l'aide juridique

Jean-François Gaudreault-DesBiens*

Vous avez requis, au nom de l'Association du Barreau canadien, notre opinion concernant l'existence possible d'un droit constitutionnel à l'aide juridique au Canada et, le cas échéant, sur les arguments et sources pouvant être invoqués au soutien d'un tel droit constitutionnel, ainsi que sur sa portée et ses contours, que ce soit en matière criminelle ou civile.

Compte tenu des exigences de brièveté que vous avez formulées à l'égard de cette opinion, nous nous en tiendrons à une analyse générale du cadre constitutionnel régissant cette question et à l'interprétation qu'en ont donnée les tribunaux. Partant, certaines questions plus spécifiques, comme par exemple la constitutionnalité d'une ou de plusieurs dispositions d'un quelconque régime d'aide juridique présentement en vigueur au Canada, ou celle de leur mise en œuvre par l'État, ne seront pas abordées dans cette opinion. Il en ira de même des questions purement procédurales intéressant spécifiquement la mise en œuvre d'un éventuel droit constitutionnel à l'aide juridique. Cette opinion cherchera donc essentiellement à répondre aux questions suivantes :

1. Existe-t-il en droit constitutionnel canadien un droit général (ou universel), absolu et d'application immédiate, à l'aide juridique et, si oui, quelles en seraient la source et la portée?
2. Si un tel droit général n'existe pas, existe-t-il néanmoins en droit constitutionnel canadien un droit « relatif » à l'aide juridique, c'est-à-dire un droit qui ne serait reconnu que dans certains contextes particuliers et dont le champ d'application serait intrinsèquement limité? Si oui, quelles en seraient les sources et la portée?
3. Enfin, si un droit constitutionnel « relatif » à l'aide juridique existe, quelles peuvent être, sur le plan prospectif, les possibilités d'extension de ce droit?

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Nous aborderons cette question en évoquant, en conclusion, quelques brèves pistes de réflexion.

Nous examinerons ces questions dans les pages qui suivent. Pour le moment, signalons d'entrée de jeu que nos conclusions principales peuvent se résumer ainsi : s'il n'existe pas de droit général, absolu et d'application immédiate, à l'aide juridique en droit constitutionnel canadien, il existe néanmoins un droit « relatif » à l'aide juridique, lequel, naissant dans des circonstances exceptionnelles décrites ci-après, peut être reconnu en matière criminelle sur la base des alinéas 10(b) et 11(d), ainsi qu'en matière civile et criminelle sur la base de l'article 7 de la *Charte canadienne des droits et libertés*.

1. Existe-t-il en droit constitutionnel canadien un droit général, absolu et d'application immédiate, à l'aide juridique?

La réponse à cette question est négative. Ni le texte de la Constitution du Canada, au sens du paragraphe 52(2) de la *Loi constitutionnelle de 1982*, ni le droit constitutionnel canadien, dans son acception la plus large, ne reconnaissent un droit constitutionnel général, absolu et d'application immédiate, à l'aide juridique. En d'autres mots, le droit constitutionnel canadien n'impose aux gouvernements aucune obligation positive générale de fournir à tout justiciable, quelle que soit sa situation, des services juridiques gratuits. La *Charte canadienne des droits et libertés*¹ contient certaines dispositions qui, interprétées largement, auraient peut-être pu fournir une assise constitutionnelle à la prétention voulant qu'une telle obligation existe. Les dispositions en question sont l'article 7 et les alinéas 10(b) et 11(d) de la *Charte*. Elles se lisent ainsi :

Article 7. Chacun a droit à la vie, à la liberté et à la sécurité de la personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Article 10. Chacun a le droit, en cas d'arrestation ou de détention :

(...)

(b) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit.

Article 11. Tout inculpé a le droit :

(...)

(d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable.

À lui seul, le libellé de ces dispositions pourrait nous mener à conclure qu'aucune obligation positive générale de fournir des services juridiques gratuits à tout

¹ *Charte canadienne des droits et libertés*, partie I de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada (R.-U.)*, 1982, c. 11.

justiciable, quelle que soit sa situation, n'incombe aux gouvernements en vertu du droit constitutionnel canadien. C'est du reste la conclusion à laquelle en sont arrivés les tribunaux. Ainsi, la Cour d'appel de l'Ontario faisait remarquer, dans l'arrêt *R. v. Rowbotham*, qu'une distinction doit être faite entre le droit d'avoir recours à l'assistance d'un avocat, lequel est constitutionnalisé à l'alinéa 10(b), et celui de se voir fournir les services d'un avocat aux frais de l'État, lequel n'est pas, quant à lui, enchâssé dans la Constitution.² Appelé à statuer sur la question précise de savoir si cet article de la *Charte* imposait aux gouvernements une obligation constitutionnelle positive de prendre les mesures nécessaires pour qu'une personne mise en état d'arrestation ou placée en détention puisse obtenir *sans frais* et sans délai des conseils juridiques préliminaires, le juge en chef Lamer de la Cour suprême du Canada signalait dans l'arrêt *R. c. Prosper* que le droit d'avoir recours à l'assistance d'un avocat « ne constitue tout simplement pas la même chose qu'un droit universel à des conseils juridiques gratuits et préliminaires 24 heures par jour ». ³ Notant que les rédacteurs de la *Charte* avaient sciemment rejeté un projet visant à intégrer dans cet instrument constitutionnel une disposition garantissant le droit à l'assistance d'un avocat si une personne en cause ne dispose pas de moyens suffisants et si l'intérêt de la justice l'exige, le juge en chef ajouta ceci :

À mon avis, il serait imprudent de n'accorder aucune importance au fait que cette disposition n'a pas été adoptée. Compte tenu de la formulation de l'article 10 de la *Charte*, qui à première vue ne garantit aucun droit substantiel à des conseils juridiques et de l'historique législatif de l'article 10, qui révèle que les rédacteurs de la *Charte* ont choisi de ne pas y incorporer un droit substantiel à l'assistance d'un avocat même relativement limité (c'est-à-dire pour ceux qui n'ont « pas de moyens suffisants et si l'intérêt de la justice l'exige »), notre Cour franchirait un grand pas si elle interprétait la *Charte* d'une façon qui impose une obligation *constitutionnelle* positive aux gouvernements. Le fait qu'une telle obligation risque presque certainement d'entrer en conflit avec la répartition des ressources limitées des gouvernements en obligeant ces derniers à affecter des fonds publics à la prestation d'un service constitue, devrais-je ajouter, une considération supplémentaire à l'encontre de cette interprétation.⁴

Sur cette question précise, le juge en chef Lamer a reçu l'assentiment de ses huit collègues. Signalons toutefois que le juge en chef a expressément

² *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, aux pages 65-66.

³ *R. c. Prosper*, [1994] 3 R.C.S. 236, à la page 266.

⁴ *Id.*, à la page 266. Dans l'arrêt *Rowbotham*, *supra*, note 2, à la page 66, la Cour d'appel de l'Ontario avait affirmé que le refus des rédacteurs de la *Charte* d'enchâsser le droit d'un accusé indigent de se voir fournir un avocat s'expliquait par le fait que ceux-ci avaient estimé que les régimes d'aide juridique en vigueur à l'époque répondaient « adéquatement » aux besoins des personnes faisant l'objet d'accusations criminelles graves mais de disposant pas eux-mêmes de moyens suffisants pour retenir les services d'un avocat. Soulignons par ailleurs que la formulation « n'ont pas de moyens suffisants et si l'intérêt de la justice l'exige » reprend pour l'essentiel les termes du *Pacte international relatif aux droits civils et politiques* (A.G. Rés. 2200 A (XXI), 16/12/66) qui prévoit notamment, à son alinéa 14(d), que la personne accusée d'une infraction pénale a droit, en pleine égalité, « chaque fois que l'intérêt de la justice l'exige, à se voir attribuer d'office un défenseur, sans frais, si elle n'a pas les moyens de le rémunérer. » Le Canada, faut-il le rappeler, est partie à ce *Pacte*.

circonscrit la portée de ses commentaires en indiquant que l'affaire *Prosper* ne soulevait pas la question de savoir « si la *Charte* garantit le droit à l'assistance d'un avocat rémunéré par l'État à l'étape *du procès et de l'appel* ». ⁵ Au vu de pareils commentaires, et considérant que, *stricto sensu*, la *ratio* de *Prosper* est que l'alinéa 10(b) de la *Charte* n'oblige pas les gouvernements à mettre sur pied des services d'avocats de garde dispensant gratuitement et 24 heures sur 24 des conseils juridiques sommaires, ⁶ on peut se demander s'il n'y aurait pas lieu de limiter la portée concrète de cet arrêt au seul cas des avocats de garde dispensant sans frais des conseils préliminaires. Cependant, pareille tentative serait selon nous vouée à l'échec. De fait, la généralité des commentaires du juge en chef Lamer portant, d'une part, sur la non-inclusion intentionnelle dans la *Charte* d'un droit substantiel à l'assistance d'un avocat échéant, si l'intérêt de la justice l'exige, aux justiciables ne disposant pas de moyens suffisants - droit dont, notons-le, la portée aurait été intrinsèquement limitée, et, d'autre part, sur les possibilités de conflit entre l'obligation constitutionnelle que l'appelant *Prosper* incitait la Cour à reconnaître et les ressources limitées que les gouvernements sont chargés de répartir, nous permet de croire que la portée de *Prosper* va au-delà de ce qui constitue sa *ratio decidendi* au sens strict. Dans le concret, cela signifie que le refus par la Cour suprême d'imposer aux gouvernements une obligation constitutionnelle positive d'assurer des services d'avocats de garde 24 heures par jour, et ce, *sans frais*, couvre non seulement les conseils préliminaires, mais probablement aussi ceux qui pourraient être donnés dans le cadre d'un procès ou même d'un appel. On voit mal, en effet, comment des conseils donnés sans frais dans le cadre d'un procès ou d'un appel pourraient faire l'objet d'une obligation constitutionnelle positive alors que de simples conseils préliminaires, du reste beaucoup moins onéreux dans un contexte de ressources limitées, ne font pas, selon la Cour suprême, l'objet d'une telle obligation. Par surcroît, même si on limitait l'impact de l'arrêt *Prosper* au cadre étroit délimité par sa *ratio*, le simple refus par la Cour de reconnaître l'existence d'une obligation constitutionnelle étatique de fournir *gratuitement* des services d'avocats de garde à toute heure de la journée, fait logiquement obstacle à toute possibilité qu'existe au Canada un droit constitutionnel plus général encore, absolu et d'application immédiate à l'aide juridique, que ce soit en matière criminelle ou, a fortiori, en matière civile et quelle que soit la disposition de la *Charte* (article 7 ou alinéas 10(b) et 11(d)) qui puisse être invoquée.

Au vu de ce qui précède, nous concluons qu'aucune obligation positive générale de fournir des services juridiques gratuits à tout justiciable, quelle que soit sa situation, n'incombe aux gouvernements en vertu du droit constitutionnel canadien. Bref, aucun justiciable ne saurait invoquer un quelconque droit

⁵ *R. c. Prosper, ibid.*

⁶ Voir, dans le même sens, l'arrêt connexe *R. c. Matheson*, [1994] 3 R.C.S. 328, à la page 336.

constitutionnel absolu à l'aide juridique. Ce qui ne signifie toutefois pas qu'il ne puisse exister de droit constitutionnel « relatif » à l'aide juridique, comme nous le verrons ci-après.

2. Existe-t-il en droit constitutionnel canadien un droit « relatif » à l'aide juridique, c'est-à-dire un droit qui ne serait reconnu que dans certains contextes particuliers et dont le champ d'application serait intrinsèquement limité?

Imaginons qu'un individu, mis en état d'arrestation et/ou inculpé d'un acte criminel, ne puisse avoir recours aux services d'un avocat pour assurer sa défense parce qu'il ne satisfait pas aux critères d'admissibilité du régime d'aide juridique qui lui serait potentiellement applicable et que sa situation financière ne lui permet pas d'acquitter lui-même les honoraires d'un avocat. Cet individu pourrait-il demander à un tribunal compétent au sens de l'article 24 de la *Charte canadienne des droits et libertés*, d'ordonner à l'État d'assumer les frais d'avocat reliés à sa défense, en invoquant au soutien de cette demande un droit de nature constitutionnelle? La réponse à cette question est positive, encore qu'il faille impérieusement préciser qu'un tel droit ne sera reconnu que dans des circonstances exceptionnelles. Les tribunaux canadiens ont en effet posé un certain nombre de balises à son exercice, lesquelles seront étudiées ci-après.

Le premier véritable arrêt de principe sur la question a été l'arrêt *R. v. Rowbotham*, précité. Dans cette espèce, la Cour d'appel de l'Ontario devait notamment se pencher sur le cas de Laura Kononow, qui était accusée d'une infraction criminelle grave, en l'occurrence d'avoir participé à un complot en vue de trafiquer de la drogue. La demande d'aide juridique de madame Kononow avait été refusée sous prétexte qu'elle disposait de moyens suffisants pour retenir les services d'un avocat. Cependant, celle-ci soutenait ne pas avoir de tels moyens. Compte tenu de la preuve présentée en première instance ainsi que de la durée du procès estimée à au moins 12 mois, entre autres en raison de la présence de plusieurs coaccusés, la Cour jugea que, de fait, madame Kononow ne disposait pas de moyens financiers suffisants pour lui permettre de payer un avocat pendant un procès d'une telle longueur, encore qu'un tel avocat ne fût pas nécessairement obligé d'être tous les jours en salle d'audience pour lui assurer une défense adéquate. Sur le plan des principes, la Cour souligna que, malgré la décision des rédacteurs de la *Charte* de ne pas constitutionnaliser, au profit de tout accusé indigent, de droit aux services d'un avocat payé par l'État, cette *Charte* pouvait malgré tout venir en aide à un tel accusé : “[I]n cases not falling within provincial legal aid plans, ss. 7 and 11(d) of the Charter, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial.”⁷ Après avoir posé le principe qu'un tel accusé peut, en de rares circonstances, se voir reconnaître un droit constitutionnel à un avocat payé par l'État, la Cour en précisa

⁷ *R. v. Rowbotham*, *supra*, note 2, à la page 66.

l'étendue et, à cette fin, élaborera un test à deux volets devant inspirer l'analyse du juge saisi d'une demande en ce sens :

[T]here may be rare circumstances in which legal aid is denied but the trial judge, after an examination of the means of the accused, is satisfied that the accused, because of the length and complexity of the proceedings or for other reasons, cannot afford to retain counsel to the extent necessary to ensure a fair trial. In those circumstances, even before the advent of the *Charter*, the trial judge had the power to stay proceedings until counsel for the accused was provided. Such a stay is clearly an appropriate remedy under s. 24(1) of the *Charter*. Where the trial judge exercises this power, either Legal Aid or the Crown will be required to fund counsel if the trial is to proceed.⁸

Le premier volet de ce test exige donc que preuve soit faite que, ne disposant pas lui-même des moyens pour rémunérer un avocat, l'accusé ne peut par ailleurs bénéficier de l'aide juridique, alors que le second volet du test requiert du tribunal saisi de la demande qu'il juge, à la lumière de la nature plus ou moins complexe de l'accusation, la nécessité d'un avocat afin d'assurer la défense pleine et entière de l'accusé.

Bien qu'utile, le test de « moyens » et de « nécessité » élaboré par la Cour d'appel de l'Ontario dans l'arrêt *Rowbotham* laissait tout de même planer quelques ambiguïtés.⁹ Ainsi, comment mesurer, dans le concret, la nécessité d'un avocat? Au surplus, le test de *Rowbotham* pouvait-il s'appliquer dans des contextes autres que criminels? La Cour suprême du Canada fit le point sur ces questions en 1999, dans l'arrêt *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G.(J.)*.¹⁰ La Cour devait se pencher dans cette espèce sur le cas d'une mère démunie qui souhaitait s'opposer à une demande gouvernementale de prolongation d'une ordonnance conférant la garde de ses enfants au ministre de la Santé et des Services communautaires, mais qui ne pouvait, selon elle, le faire efficacement sans avocat. Or, non seulement la mère n'avait pas les moyens de rémunérer un avocat de pratique privée, mais on lui avait au surplus refusé le secours de l'aide juridique sous prétexte qu'une directive excluait la procédure en cause - liée à une demande de garde soumise par le ministre - des services d'aide juridique disponibles au moment du dépôt de la demande d'aide. Se posait donc la question de savoir si de telles circonstances pouvaient donner naissance, un peu comme dans *Rowbotham*, à un droit constitutionnel, fût-il limité, aux services d'un avocat rémunéré par l'État. Étant donné que la procédure entreprise n'était pas de nature pénale, les alinéas 10(b) et 11(d) de la *Charte* n'étaient d'aucune utilité pour la mère. Aussi celle-ci argua-t-elle que c'étaient ses droits garantis à l'article 7 qui avaient été violés. La Cour suprême lui donna raison, soutenant que « [l']article 7 garantit aux parents le droit à une audience équitable lorsque l'État

⁸ *Id.*, à la page 69.

⁹ Voir à cet égard l'article suivant : M. Benton & M.D. Smith, "The Right to State-Funded Counsel at Trial" (1998) 56 *The Advocate* 373.

¹⁰ *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G.(J.)*, [1999] 3 R.C.S. 46.

demande la garde de leurs enfants. Dans certaines circonstances, que l'on retrouve dans la présente affaire, le droit des parents à une audience équitable exige que le gouvernement leur fournisse les services d'un avocat rémunéré par l'État. »¹¹

Pour en arriver à cette conclusion, le juge en chef Lamer statua, d'une part, que la demande gouvernementale de prolongation de l'ordonnance de garde était bel et bien de nature à affecter le droit à la sécurité de la mère de l'enfant visé par l'ordonnance,¹² d'autre part, que l'article 7 de la *Charte* s'appliquait aussi bien aux matières civiles que criminelles, et, enfin, que la restriction potentielle du droit de la mère à la sécurité de sa personne n'aurait pas été conforme aux principes de justice fondamentale si elle n'avait pas été représentée par un avocat lors de l'audience relative à la garde. Autrement dit, la non-représentation de la mère par un avocat dans les circonstances particulières de cette espèce – non-admissibilité de la mère à l'aide juridique et incapacité de sa part d'assumer personnellement les honoraires d'avocat – aurait rendu inéquitable l'audience devant être tenue à propos de la garde de son enfant, le tout en contravention des principes de justice fondamentale.

Cette exigence de représentation par avocat découle de l'application par le juge en chef Lamer de trois facteurs principaux, à savoir, l'importance des intérêts en jeu, la complexité de l'instance et les capacités de la personne qui réclame les services d'un avocat rémunéré par l'État. L'application du premier facteur exige une analyse comparée des droits et intérêts en cause, dont le résultat variera selon les circonstances de chaque affaire. En ce qui a trait à l'évaluation de la complexité de l'instance, le juge Lamer fait référence à des critères comme la nature contradictoire de l'instance ou les difficultés liées à la préparation, la présentation et l'administration de la preuve pour une partie non représentée par avocat, le tout compte tenu de l'état psychologique dans lequel peut se trouver cette partie.¹³ Enfin, en ce qui a trait au critère de la capacité de la personne qui réclame les services d'un avocat rémunéré par l'État, le juge en chef renvoie à son degré

¹¹ *Id.*, à la page 75.

¹² Quand y a-t-il violation du droit à la sécurité de la personne garanti à l'article 7? À la page 77 de l'arrêt, le juge en chef rappelle que le droit à la sécurité de la personne garanti à l'article 7 peut être mis en cause en présence d'une tension psychologique grave causée par l'État ou une violation grave de l'intégrité psychologique de l'individu. Plus particulièrement, poursuit-il, « [p]our qu'une restriction de la sécurité de la personne soit établie, il faut donc que l'acte de l'État faisant l'objet de la contestation ait des répercussions graves et profondes sur l'intégrité psychologique d'une personne. On doit procéder à l'évaluation objective des répercussions de l'ingérence de l'État, en particulier de son incidence sur l'intégrité psychologique d'une personne ayant une sensibilité raisonnable. Il n'est pas nécessaire que l'ingérence de l'État ait entraîné un choc nerveux ou un trouble psychiatrique, mais ses répercussions doivent être plus importantes qu'une tension ou une angoisse ordinaires. » (aux pages 77-78) De surcroît, pour constituer une violation de l'article 7, l'atteinte à l'intégrité psychologique doit résulter d'une action volontaire directe de la part de l'État – du moins est-ce ce que l'on tire des exemples d'ingérences non justiciables sous l'empire de l'article 7 qui sont donnés à la page 79 de l'arrêt. Pour que son ingérence affecte les intérêts protégés par l'article 7, l'État doit donc d'une façon ou d'une autre se prononcer sur la qualité de l'individu, chercher à s'ingérer dans son intimité ou à se substituer à lui.

¹³ Fait à noter, le juge en chef Lamer ne fait pas mention, au chapitre de la complexité de l'instance, du devoir qui incombe au juge d'assister raisonnablement le justiciable non représenté par avocat, tout en évitant, il va sans dire, les situations qui pourraient le placer en conflits d'intérêts. Sur ce devoir, voir les commentaires de la Cour d'appel du Québec dans *Sechon v. R.* (1995), 45 C.R. (4th) 231, aux pages 238-239. Ce silence du juge en chef ne signifie pas pour autant, selon nous, que cette question soit devenue non pertinente.

d'instruction, son sang-froid, ses capacités de communication, etc.¹⁴ Jumelés les uns aux autres, ces trois facteurs visent essentiellement à mesurer si la personne peut participer *efficacement* à l'audience, ce qui, ajoute le juge en chef, « dépasse la simple capacité de comprendre et de communiquer ». ¹⁵ Ce faisant, le juge en chef, soutenu sur cette question par tous ses collègues, fait un pas de plus vers une conception concrète et substantielle, par opposition à simplement formelle, des exigences minimales ayant trait à l'équité d'une procédure civile ou criminelle sous l'empire de l'article 7 de la *Charte*.

En l'espèce, parce que la restriction au droit de la mère à la sécurité de sa personne n'avait pas été faite en conformité des principes de justice fondamentale et que, de surcroît, cette restriction ne pouvait se justifier aux termes de l'article 1 de la *Charte*, la réparation appropriée fut d'émettre une ordonnance enjoignant au gouvernement de fournir à la partie non représentée les services d'un avocat rémunéré par l'État.

La portée de l'arrêt *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G.(J.)* est très vaste. Malgré les multiples passages où le juge en chef Lamer tente de convaincre ses lecteurs que sa portée se limite aux circonstances particulières de l'espèce ou que cette portée est en toute hypothèse plutôt restreinte, on ne peut qu'être frappé par la considérable extension que la Cour fait subir au droit constitutionnel « relatif » aux services d'un avocat rémunéré par l'État qui avait déjà été timidement reconnu en matière criminelle.

Premièrement, la Cour suprême met en pratique de côté l'obligation relative de réserve qu'elle avait imposée dans l'arrêt *Prosper* aux tribunaux appelés à se prononcer sur la reconnaissance d'obligations constitutionnelles positives qui incomberaient aux gouvernements eu égard à la fourniture de services d'avocats rémunérés par l'État. Rappelons-le, la *ratio* de *Prosper* est que l'alinéa 10(b) de la *Charte* n'oblige pas les gouvernements à mettre sur pied des services d'avocats de garde dispensant gratuitement et 24 heures sur 24 des conseils juridiques sommaires. Or, le juge en chef Lamer distingue *G.(J.)* de *Prosper* en soulignant que :

[l']absence de mention d'un droit positif à des services d'avocats rémunérés par l'État à l'article 10, à laquelle il convient d'accorder une certaine importance ainsi que je l'ai dit dans l'arrêt *Prosper*, n'écarte pas la possibilité d'interpréter l'article 7 comme imposant aux gouvernements l'obligation constitutionnelle positive de fournir des

¹⁴ *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G.(J.)*, *supra*, note 10, aux pages 83-84.

¹⁵ *Id.*, à la page 86. Comme exemple d'application récente de ces facteurs, citons la récente affaire *Côté c. P.G.Q.*, (C.S. Saint-François, 450-36-000373-010, 27 août 2001, J. Bellavance (en appel)), le requérant était inculpé de plusieurs chefs d'accusation à caractère sexuel ayant trait à des actes commis pendant une longue période de temps. Âgé de cinquante ans et déjà détenu depuis deux mois, Côté ne pouvait se trouver un avocat. D'une part, il n'était pas admissible à l'aide juridique en raison de son revenu supérieur au seuil fixé dans la Loi sur l'aide juridique. D'autre part, le caractère sordide et la gravité des accusations portées contre lui, ainsi que l'ampleur du dossier et l'investissement en temps qu'il exigerait d'un avocat, expliquaient aussi probablement les difficultés éprouvées par Côté à s'en trouver un. Enfin, il était dans l'impossibilité d'emprunter à quiconque de l'argent.

services d'avocats dans les cas où cela est nécessaire à l'équité de l'audience. Autrement, on se trouverait à affirmer que les principes de justice fondamentale ne garantissent pas le droit à une audience équitable ou bien qu'en aucun cas, ce droit n'oblige les gouvernements à puiser dans leurs fonds pour qu'une personne soit représentée par avocat. Ces positions sont toutes deux indéfendables. À mon avis, l'omission d'inclure un droit positif à des services d'avocats rémunérés par l'État, à l'article 10, signifie qu'il ne faut pas interpréter l'article 7 comme prévoyant un droit *absolu* à ces services dans toutes les audiences où la vie, la liberté et la sécurité d'une personne sont en jeu et que la personne n'a pas les moyens de se payer un avocat. Par conséquent, même si on ne peut conclure à l'existence d'un droit général à des services d'avocats rémunérés par l'État en vertu de l'article 10, l'article 7 comprend un droit limité à de tels services pour assurer l'équité de l'audience dans les circonstances décrites plus haut.¹⁶

Même relativisé par l'article 10, lequel fait obstacle à toute interprétation absolutiste de l'article 7, et limité aux services d'avocats qui, dans certaines circonstances particulières, sont nécessaires pour assurer l'équité de l'audience au sens de l'article 7, le droit constitutionnel à des services d'avocats rémunérés par l'État, fût-il relatif, voit donc sa portée considérablement étendue, du moins si l'on compare l'état du droit selon *G.(J.)* avec ce qu'il était sous l'empire de *Prosper*.

Deuxièmement, cet élargissement de la portée de ce droit paraît plus considérable encore considérant le rejet par la Cour suprême des approches qui établissent, d'une part, des distinctions catégoriques et totalisantes entre instances contradictoires ou administratives et, d'autre part, des distinctions entre matières criminelles et civiles, ceci aux fins de l'application de l'article 7 à des espèces soulevant la question du droit aux services d'un avocat rémunéré par l'État.

Troisièmement, les observations que fait le juge en chef Lamer à l'égard du rapport devant être établi entre l'article 1 de la *Charte* et les violations de l'article 7 que l'État pourrait tenter de justifier sous l'empire de cet article 1 militent-elles aussi en faveur de la position selon laquelle la portée du droit aux services d'un avocat rémunéré par l'État a été considérablement élargie dans l'arrêt *G.(J.)* De fait, le juge en chef opine que des motifs de commodité administrative ne peuvent racheter une violation de l'article 7 que dans des « circonstances qui résultent de conditions exceptionnelles comme les désastres naturels, le déclenchement d'hostilités, les épidémies et ainsi de suite ». Dans cette optique, il ajoute que « le non-respect des principes de justice fondamentale - et, en particulier, du droit à une audience équitable - sera rarement reconnu comme une limite raisonnable dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique ».¹⁷ Cette norme de contrôle extrêmement stricte pourrait faire en sorte que dès lors qu'un tribunal conclurait à une violation de l'article 7, ce

¹⁶ *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G.(J.)*, *id.*, à la page 96.

¹⁷ *Id.*, à la page 92.

tribunal serait en pratique justifié de remettre en cause l'allocation des ressources déterminée par le gouvernement.

Quatrièmement, l'impression selon laquelle un véritable élargissement du droit aux services d'un avocat rémunéré par l'État a été opéré dans l'arrêt *G.(J.)* est confortée par l'impact concret que risque d'avoir cet arrêt sur l'élaboration et l'administration des programmes d'aide juridique, et ce, au-delà de la rhétorique rassurante qu'emploie la Cour suprême sur la question. En effet, bien que le juge en chef Lamer prenne soin de souligner que « [l]e gouvernement jouit d'une très grande latitude pour ce qui est de s'acquitter de son obligation constitutionnelle de fournir un avocat rémunéré par l'État dans les instances où cette obligation prend naissance (...) » et que « [la Cour suprême] n'a pas besoin de dicter au gouvernement du Nouveau-Brunswick le mécanisme de prestation de services auquel il aurait fallu recourir, et elle ne doit pas le faire », ¹⁸ il n'en reste pas moins que, s'éloignant de sa position exprimée antérieurement dans *Prosper*, l'honorable juge applique le test de l'article 1 de manière à remettre concrètement en question l'allocation des ressources décidée par le gouvernement du Nouveau-Brunswick eu égard à son programme d'aide juridique. Il y a donc tout lieu de s'attendre à une ingérence judiciaire accrue dans l'administration et la mise en oeuvre de tels programmes. Cette conclusion s'impose d'autant plus que, dans son opinion distincte mais convergente dans l'affaire *G.(J.)*, madame le juge L'Heureux-Dubé souligne que l'application des facteurs pouvant mener à la conclusion qu'une personne a droit, en vertu de l'article 7, à se voir fournir les services d'un avocat rémunéré par l'État si elle n'est pas admissible à l'aide juridique et si elle ne dispose pas de moyens suffisants pour payer elle-même un avocat, devrait probablement faire en sorte « que les cas où la présence d'un avocat sera requise ne seront pas nécessairement rares ». ¹⁹

Au vu de ce qui précède, nous partageons la conclusion du doyen Hogg lorsque celui-ci affirme qu'à la suite de l'arrêt *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G.(J.)*, "[t]his positive constitutional obligation is potentially applicable to every criminal case in which there is a possibility of the penalty of imprisonment, and every civil case or administrative proceeding in which the categories of life, liberty or security of the person are involved." ²⁰ Clairement, la « latitude » dont disposaient les gouvernements dans l'élaboration et la gestion de leurs programmes d'aide juridique n'est plus ce qu'elle a déjà été. ²¹

¹⁸ *Id.*, à la page 89.

¹⁹ *Id.*, à la page 106. Fait à noter, le juge L'Heureux-Dubé parle également ici au nom de ses collègues McLachlin et Gonthier.

²⁰ P.W. Hogg, *Constitutional Law of Canada*, Toronto, Carswell, no. 47.4(k), p. 47-17 (édition à feuilles mobiles).

²¹ On pourrait même soutenir que l'arrêt *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G.(J.)* jette les bases d'une obligation constitutionnelle limitée, imposée aux gouvernements, de financer les services d'aide juridique. Nous ne prononçons toutefois pas formellement sur cette question, qui pourrait à elle seule faire l'objet d'une autre opinion.

3. Conclusion : bilan et pistes de réflexion

Sous réserve des commentaires qui précèdent, on peut résumer ainsi les paramètres qui régissent l'analyse de la question de savoir s'il existe en droit constitutionnel canadien un droit à l'aide juridique :

- a. Il n'existe pas de droit général, absolu et d'application immédiate, à l'aide juridique en droit constitutionnel canadien.
- b. Il existe en droit constitutionnel canadien un droit « relatif » à l'aide juridique, lequel, naissant dans des circonstances exceptionnelles décrites ci-avant, peut être reconnu en matière criminelle sur la base des alinéas 10(b) et 11(d), ainsi qu'en matières civile et criminelle sur la base de l'article 7 de la *Charte canadienne des droits et libertés*.
- c. Ce droit « relatif » ou limité peut être reconnu lorsque la personne qui réclame les services d'un avocat rémunéré par l'État a été déclarée non admissible à l'aide juridique et ne dispose par ailleurs pas des moyens nécessaires pour retenir elle-même les services d'un avocat. Ce droit n'est toutefois ouvert que lorsque la situation de cette personne est telle que son droit à une audience équitable serait battu en brèche en l'absence d'un avocat. En ce sens, ce droit joue un rôle supplétif et vise à pallier les carences de certains régimes d'aide juridique lorsque ces carences empêchent la tenue d'une audience équitable.
- d. L'examen de la situation de la personne qui formule une telle demande se fera à partir de trois facteurs, soit l'importance des intérêts en jeu, la complexité de l'instance et les capacités de cette personne. L'objectif de cet exercice est de déterminer si la partie non représentée est néanmoins en mesure de participer efficacement à l'audience.
- e. L'obligation constitutionnelle imposée au gouvernement de fournir les services d'un avocat rémunéré par l'État dans les circonstances appropriées ne saurait cependant se muer en un droit général, échéant au justiciable « créancier » de cette obligation, de voir l'État payer *n'importe quel* avocat que choisirait ce justiciable.
- f. Compte tenu que ce droit constitutionnel « relatif » et limité trouve sa source aux articles 10(b), 11(d) ou 7 de la *Charte*, il s'ensuit qu'une action gouvernementale doit nécessairement être à l'origine de sa violation. Dans ce sens, un litige entre des parties privées, par exemple un litige entre des parents quant à la garde d'un enfant, ne saurait donner ouverture à l'application de ce droit.

- g. L'interprétation la plus plausible, voire la plus probable, des commentaires de la Cour suprême dans l'arrêt *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G.(J.)* est que l'État doit non seulement être partie à l'instance, mais qu'il doit au surplus être à l'origine de celle-ci.

Ces paramètres étant posés, pourrait-on envisager un jour un autre élargissement de ce droit « relatif » à l'aide juridique? Nous signalerons ci-après quelques pistes de réflexion qui mériteraient éventuellement d'être approfondies, mais dans un cadre autre que celui que fournit cette opinion.

Une première remarque s'impose, qui a trait à la stratégie. Compte tenu de la réticence que les tribunaux ont traditionnellement éprouvée à remettre en question les politiques gouvernementales en matière d'allocation de fonds publics, ceux qui voudraient tenter de les convaincre d'étendre encore la portée du droit constitutionnel « relatif » à l'aide juridique reconnu par la Cour suprême du Canada auraient tout intérêt à bien choisir leur cible. Bien que clairement atténuée dans l'arrêt *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G.(J.)*, cette réticence demeurera sans doute toujours présente en toile de fond.

Deuxième remarque, ayant trait cette fois au droit substantiel. À la lecture de l'arrêt *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G.(J.)*, on reste avec l'impression que cet arrêt marque un point tournant pour la Cour suprême du Canada, au point où il pourrait augurer un changement de paradigme dans l'appréhension judiciaire de la notion d'« accès à la justice ». Pareil changement, pourrait-on arguer, s'impose d'autant plus que la situation de l'aide juridique au Canada a évolué depuis l'adoption de la *Charte canadienne des droits et libertés*. Ainsi, dans l'arrêt *Rowbotham*, la Cour d'appel de l'Ontario justifiait la non-inclusion de ce droit dans la *Charte* en se fondant sur l'avis des rédacteurs de celle-ci, selon qui les régimes en vigueur au début des années 80 étaient « adéquats ». ²² En est-il toujours ainsi en 2001, après des années de coupures budgétaires? Peut-être bien, mais cela reste à voir. Il s'agirait donc de déterminer, le cas échéant, l'impact de tels changements sur l'interprétation à donner à un droit constitutionnel, fût-il limité, aux services d'un avocat rémunéré par l'État. À cet égard, s'il faut prendre très au sérieux la mise en garde du juge L'Heureux-Dubé, dans l'arrêt *Prosper*, contre l'application de la théorie de « l'arbre vivant » en matière d'interprétation de la *Charte*, ²³ on ne saurait pour autant nier que les conditions socioéconomiques ont effectivement pu changer depuis l'adoption de la *Charte*. Aussi, sans prétendre transformer du tout au tout

²² *R. v. Rowbotham*, *supra*, note 2, à la p. 66.

²³ *R. c. Prosper*, *supra*, note 3, aux pp. 287-288. Dissidente quant au résultat de l'appel, le juge L'Heureux-Dubé, en faisant ces commentaires, appuyait néanmoins la conclusion majoritaire du juge en chef quant à l'inexistence d'une obligation constitutionnelle incombant à l'État de maintenir sans frais un service d'avocats de garde vingt-quatre heures sur vingt-quatre.

l'approche judiciaire en la matière, il y a lieu de se demander si la prise en compte de cette évolution ne pourrait pas permettre d'étendre encore un peu plus la portée de ce droit.

Troisième remarque, quant à elle liée à la fois à la stratégie et au fond : il nous apparaît que toute nouvelle tentative d'extension de la portée d'un droit constitutionnel « relatif » à l'aide juridique ne sera fructueuse que dans la mesure où l'on mettra l'accent sur des grands principes constitutionnels qui procèdent d'idéaux sociaux plus vastes, plutôt que de s'en tenir strictement à des arguties relevant de la technique juridique, si inévitables soient-elles par ailleurs. Cette stratégie viserait pour l'essentiel à prendre au mot la Cour suprême et à l'inciter à aller au bout de sa logique eu égard à l'application des principes les plus pertinents en l'espèce, en l'occurrence la primauté du droit et l'égalité. Certains désigneraient en anglais ce genre de stratégie comme participant d'une forme de « creative litigation ».

Dans la mesure où la problématique de l'existence d'un droit constitutionnel à l'aide juridique intéresse celle de l'accès à la justice, et plus particulièrement celle d'un accès concret à la justice, elle intéresse également la question de la primauté du droit. De fait, ce principe constitutionnel, selon l'acception donnée à ce concept dans le *Renvoi relatif à la sécession du Québec*,²⁴ est directement lié à la problématique de l'accès à la justice, en ce que l'absence (ou l'insuffisance) d'un accès concret et suffisant à la justice est de nature à miner la primauté du droit.²⁵ Il suffit, pour s'en convaincre, d'imaginer comment des justiciables non représentés par avocat pourraient en venir à percevoir le système juridique. Ainsi, de tels justiciables seront plus susceptibles d'être déçus du résultat d'un procès que d'autres qui auraient été représentés, puisque leur évaluation de ce résultat se fera toujours à l'aune d'une insatisfaction initiale quant au déséquilibre *non corrigé* qui marquait le rapport de forces entre les parties. Ceci, à n'en pas douter, pourrait contribuer à instaurer un climat de méfiance face au système judiciaire et à l'administration de la justice en général, sapant dès lors l'effectivité, voire la légitimité, du principe de la primauté du droit. Dans la même veine, et dans la pire des hypothèses, on pourrait évoquer le danger que le justiciable ainsi frustré en vienne à se faire justice à lui-même. Par ailleurs, se sachant incapable de se défendre efficacement, un justiciable pourrait ignorer les assignations des officiers de justice. Si pareil comportement devait se répandre, l'administration de la justice en souffrirait certainement. Enfin, un tel justiciable pourrait être tenté de « décrocher » du système juridique étatique en raison de sa perception, plus ou moins bien fondée, qu'il n'a plus aucune prise sur un système qui ne répond plus à ses attentes, si minimales soient-elles. Comme le notait le philosophe Jürgen Habermas, « (...) les citoyens d'un État de droit démocratique se comprennent comme les auteurs des lois auxquelles ils doivent obéir en tant que

²⁴ *Renvoi relatif à la sécession du Québec*, [1999] 2 R.C.S. 217.

²⁵ Nous employons ici la notion d'« accès » à la justice dans son acception classique, c'est-à-dire comme faisant référence à l'accès à la justice étatique. Pour d'autres façons d'envisager cette notion, voir : R.A. Macdonald, "Theses on Access to Justice" (1992) 7 Canadian Journal of Law & Society 23.

destinataires. »²⁶ Or, à partir du moment où un justiciable estime ne plus avoir suffisamment de prise sur le système juridique au sein duquel il évolue, il peut difficilement se considérer comme « auteur » des lois auxquelles ils est tenu d'obéir. Ainsi délégitimé, ce système ne pourra plus longtemps constituer l'épine dorsale de l'État de droit auquel il est inextricablement lié, ce qui, à terme, risque d'ébranler irrémédiablement le primat du droit dans cet État. Comme l'a bien montré la Cour suprême dans le *Renvoi relatif à la sécession du Québec*, précité, la primauté du droit et la légitimité du système juridique se renforcent l'une l'autre dans une société libre et démocratique.

Le lien entre la primauté du droit et l'idéal d'un accès concret au système étatique de justice a par ailleurs déjà incité le juge en chef Dickson à poser, au nom de la Cour suprême du Canada, la question suivante :

Pour paraphraser ce qu'a dit la Cour européenne des droits de l'homme dans l'*Affaire Golder* (...), on ne comprendrait pas que le Parlement et les provinces décrivent d'une façon aussi détaillée les droits et libertés garantis par la *Charte* et qu'ils ne protègent pas d'abord ce qui seul permet d'en bénéficier en réalité : l'accès au juge. C'est avec raison que la Cour des droits de l'homme a affirmé : « Équité, publicité et célérité du procès n'offrent point d'intérêt en l'absence de procès. » (...) À quoi bon des droits et libertés garantis par la *Charte* si une personne qui veut les faire respecter se voit refuser l'accès à un tribunal compétent ou si cet accès est retardé? Comment les tribunaux peuvent-ils agir indépendamment pour maintenir la primauté du droit et pour s'acquitter efficacement des obligations que leur impose la *Charte* si l'on entrave, empêche ou refuse l'accès aux tribunaux? Les garanties offertes par la *Charte* ne seraient dès lors qu'illusoire et la *Charte* toute entière s'en trouverait minée.²⁷

Bien que ces propos de la Cour suprême aient été formulés dans un arrêt qui s'intéressait à la question de l'accès *physique* à un Palais de justice, ce qui, sur le plan technique, le rend aisément distinguable par rapport à l'hypothèse principale examinée dans la présente opinion, il reste que, sur le plan des principes, et surtout compte tenu de l'approche « substantielle » qui inspire de plus en plus l'interprétation des droits constitutionnels, on voit mal en quoi le nonaccès pour des raisons physiques serait pire, du point de vue de la primauté du droit, que le nonaccès en raison d'un manque de moyens financiers. C'est en effet le lot d'un nombre croissant de justiciables que de se retrouver dans l'incapacité de revendiquer ou de défendre leurs droits constitutionnels en raison de leur non-admissibilité à l'aide juridique *et* d'un manque de moyens financiers. Aussi, afin de véritablement concrétiser l'idéal d'un accès maximal et concret au système de justice, il convient de se demander si les tribunaux ne devront pas tôt ou tard accepter d'élargir plus encore le droit « relatif » à l'aide juridique dont ils ont déjà reconnu l'existence dans certaines circonstances. N'y va-t-il pas, en bout

²⁶ J. Habermas, *Après l'État-nation. Une nouvelle constellation politique*, Paris, Fayard, 2000, à la page 108.

²⁷ *B.C.G.E.U. c. Colombie-Britannique*, [1988] 2 R.C.S. 214, à la page 229.

de ligne, de l'effectivité du principe constitutionnel de la primauté du droit?

À ces questions intéressant l'accès *concret* des justiciables au système de justice s'en ajoute une autre, aussi fondamentale, celle de leur accès *égal* à ce système. Plus encore que l'accès au système judiciaire comme tel, c'est l'accès à la loi même qui pourrait dans certains cas être compromis. Or, le paragraphe 15(1) de la *Charte* ne dispose-t-il pas que « la loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination... »? Au-delà même des espèces où ce droit particulier trouve application de manière spécifique, il se pourrait bien que l'égalité constitue un principe constitutionnel sous-jacent de l'ordre juridique canadien.²⁸ Partant, des considérations égalitaristes devraient influencer sur l'interprétation de l'article 7 dans des affaires soulevant la question de l'étendue du droit constitutionnel « relatif » à l'aide juridique. C'est du reste ce que soutenait le juge L'Heureux-Dubé, appuyée en cela par deux de ses collègues sans être expressément contredite par les autres, dans l'opinion distincte, mais convergente, qu'elle a rédigée dans l'affaire *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G.(J.)*.²⁹

Reste à savoir si l'article 15 pourrait, en certaines circonstances, agir comme source *autonome* d'un droit constitutionnel « relatif » à l'aide juridique dans l'hypothèse où, par exemple, l'article 7 ne trouverait aucune application. Cette question soulève entre autres la problématique du type d'action étatique susceptible de mener à la reconnaissance d'un tel droit constitutionnel. Une ingérence « agressive » et volontaire de l'État susceptible de mener à la tenue d'une audience quelconque constitue-t-elle une condition *sine qua non* à la reconnaissance éventuelle d'un tel droit, ce qui confinerait à toutes fins pratiques les possibilités d'une telle reconnaissance aux situations visées par l'article 7? À cet égard, nous avons souligné précédemment que l'interprétation la plus plausible, voire la plus probable, des commentaires de la Cour suprême dans l'arrêt *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G.(J.)* est que l'État doit non seulement être partie à l'instance, mais qu'il doit au surplus être *à l'origine* de celle-ci. Dans cette optique, on ne pourrait dire d'une loi discriminatoire à l'origine d'une *violation* de l'article 15 qu'elle est nécessairement à l'origine d'une *audience* ou d'une *instance*. Dût-elle l'être, elle pourrait alors faire l'objet d'un examen autant en vertu de l'article 7 que de l'article 15, dans la mesure bien sûr où les circonstances particulières de l'espèce le permettraient. Mais en l'absence d'un acte gouvernemental « agressif » et volontaire qui mènerait à la tenue d'une telle audience ou au déclenchement d'une instance, n'y aurait-il tout de même pas lieu de tenter de convaincre les tribunaux de considérer l'à-propos d'une extension du droit constitutionnel « relatif » à

²⁸ Dans ce sens, voir : P. Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle" (1999) 22 Dalhousie Law Journal 5.

²⁹ Voir les paragraphes 112-115 de cet arrêt. Sur le rôle des considérations liées à l'égalité en matière d'aide juridique, voir également l'article suivant : P. Hughes, "Domestic Legal Aid : A Claim to Equality" (1995) 2 Review of Constitutional Studies 203.

l'aide juridique au justiciable qui, ayant fait une démonstration *prima facie* de l'existence d'un cas de discrimination substantive potentiellement injustifiable sous l'empire de l'article 1, prouverait de surcroît qu'il ne peut, par manque de moyens, prendre action pour faire cesser la discrimination dont il est l'objet? Sans prendre position sur la possibilité juridique de parvenir à cet objectif ou même sur l'opportunité stratégique ou politique d'entreprendre des démarches en ce sens, il conviendrait d'examiner plus avant cette hypothèse; d'autant qu'elle repose sur deux postulats fondamentaux, à savoir, que l'égalité concrète des justiciables est en quelque sorte constitutive de leur capacité d'exercer efficacement leurs autres droits et libertés constitutionnels, d'une part, et que dans la mesure où l'on reconnaît, comme l'a fait la Cour suprême dans sa jurisprudence récente,³⁰ que l'égalité est intimement liée à la dignité de chaque individu, on saurait difficilement tolérer que la victime potentielle d'une discrimination prohibée par l'article 15 soit condamnée à l'impuissance sur le plan juridique en raison de son manque de moyens financiers et, le cas échéant, de son inadmissibilité à l'aide juridique. En pratique, ce serait un peu comme la confiner, elle et son groupe d'appartenance, à un statut permanent de minorité discriminée. Or, cela est-il acceptable dans une société libre et démocratique? Une définition plus concrète du concept d'accès à la justice permettrait-elle de remédier à de pareilles situations? Dans quelle mesure les tribunaux devraient-ils s'avancer plus encore en ce sens qu'ils ne l'ont fait jusqu'à présent dans leur jurisprudence? Malgré les quelques pistes de réflexion que nous venons d'esquisser, ces questions demeurent entières. Elles mériteraient cependant que l'on se penche plus avant sur elles.

³⁰ Voir généralement *Law c. Canada*, [1999] R.C.S. et les arrêts subséquents portant sur le droit à l'égalité garanti à l'article 15 de la *Charte*.

A Constitutional Right to Civil Legal Aid

Patricia Hughes*

This assessment of “arguments to support the existence of a constitutional right to legal aid in Canada,” particularly civil legal aid, concludes that while many of the current parameters established by the Supreme Court of Canada’s jurisprudence are not encouraging of a constitutional right to legal aid, either criminal or civil, there is at least one argument which may be made in support which relies in part on issues which the court has not yet been required to address.

Before considering the arguments in support, it is necessary to identify the boundaries within which the court has addressed legal aid or the right to publicly-funded counsel. Since these are well-known, I do not consider them in detail; nevertheless, it is important to situate consideration of arguments for a constitutionally entrenched legal aid within the current situation.

THE CURRENT STATUS OF CONSTITUTIONAL RIGHT TO LEGAL AID

To date, the only recognized constitutional right to publicly-funded counsel reflects the statutory and pre-*Charter* common law situation as it applies to the criminal law context: where necessary for an accused to have a fair trial, the judge has the discretion to order state-funded counsel (sections 684(1) and 694.1 of the *Criminal Code* and section 11 of the *Young Offenders Act*, R.S.C. 1985, c.Y-1); *R. v. Ewing and Kearney* (1974), 18 C.C.C. (2d) 356 (B.C.C.A.); *Re White and the Queen* (1976), 32 C.C.C. (2d) 478 (Alta. C.A.)). Provincial appellate courts have interpreted section 7 of the *Canadian Charter of Rights and Freedoms* to give judges the discretion to order state-funded counsel where necessary for a fair trial, taking into account factors such as the seriousness of the charge and its consequences, the complexity of the case and the capacity of the accused to represent her or himself: *R. v. Rowbotham* (1988), 25 O.A.C. 321 (C.A.); *R. v. Robinson* (1990), 51 C.C.C. (3d) 452 (Alta. C.A.); *R. v. Rain*, [1998] A.J. No. 1059 (C.A.) (Q.L.) (lv. to appeal to S.C.C. dismissed), [1998] S.C.C.A. No. 609

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(Q.L.). Without explicitly approving the “*Rowbotham* criteria,” the Supreme Court of Canada has extended a modified version to civil proceedings in which a party is subject to state-induced stress, specifically child protection proceedings: *New Brunswick (Minister of Health and Community Services v. G.(J.)*, [1999] 3 S.C.R. 46.

None of these cases establishes a constitutional right to legal aid, in contrast to an *ad hoc* right to publicly-funded counsel in the circumstances of the particular case, subject to a trial judge’s assessment of the relevant criteria. Judicial determinations may have an impact on a province’s legal aid plan (such as requiring it to pay rates higher than the tariff to permit the accused to retain senior counsel: *R. v. Chan*, [2000] A.J. No. 1223 (Q.B.) (Q.L.), although the government may also pay for counsel through other means: *G.(J.)*, (*supra*)). (For refusals to appoint counsel, see *Re Monroe and the Queen* (1990), 97 N.S.R. (2d) 361 (S.C.), *aff’d* 98 N.S.R. (2d) 174 (C.A.); *Panacui v. Legal Aid Society (Alta.)* (1987), 80 A.R. 137 (Q.B.); *Rockwood v. The Queen* (1989), 49 C.C.C. 129 (N.S.C.A.)); and for cases in which counsel have been appointed for a variety of reasons in different contexts, because of the complexity or extraordinary nature of the cases, see *R. v. L.C.W.*, [2000] S.J. No. 145 (Q.B.) (Q.L.) (accused permitted two counsel); *R. v. Dedam*, [2001] N.B.J. No. 186 (Prov. Ct.) (Q.L.) (although the penalty was a fine, the case raised issues of national importance); *R. v. Chan* (2000), 145 C.C.C. (3d) 494 (Alta. C.A.) (a bail hearing); and *R. v. Fok*, [2000] A.J. No. 1182 (Q.B.) (Q.L.) (in order to determine pre-trial whether an accused requires state-funded counsel for the trial).

In the criminal context, the Supreme Court of Canada has spoken to this issue only in the context of section 10(b) of the *Charter*, the guarantee to retain and instruct counsel without delay and to be informed thereof when under arrest or detention: *R. v. Brydges*, [1990] 1 S.C.R. 190; *R. v. Bartle*, [1994] 3 S.C.R. 173; *R. v. Prosper*, [1994] 3 S.C.R. 236; *R. v. Matheson*, [1994] 3 S.C.R. 328.

In doing so, the court has consistently and unanimously said that section 10 does not establish a constitutional right to a duty counsel type system. Thus a full bench unanimously held in *Prosper, supra*, that section 10(b) does not impose a substantive constitutional obligation on governments to establish a duty counsel system. While Lamer C.J. (as he then was) extolled the virtues of these systems and while the court may be willing to provide remedies indirectly consequent on the failure to establish a duty counsel system (for example, excluding evidence because an impecunious accused may not have had legal counsel since there was no publicly-funded system), the court has not taken the next step of requiring that a system be established.

Lamer C.J. concluded in *Prosper, supra*, that the court should not infer a constitutional obligation to establish a duty counsel system because of the lack of an expressly stated right under section 10, the rejection by the framers of the *Charter* of an amendment for publicly-funded counsel, the fact that it would

require the government to establish programs and the cost. L'Heureux-Dubé J., dissenting on the application of section 24(2) in *Prosper, supra*, explicitly rejected arguments that the “living tree” approach supported a conclusion that constitutional interpretation had evolved to the point where state-funded duty counsel should be constitutionally guaranteed: this theory, she said, “has never been used to transform completely a document or add a provision which was specifically rejected at the outset.” These comments and reasons must be treated seriously in developing any argument for a constitutionally entrenched right to legal aid, whether in the criminal or civil context.

The section 10 cases have not raised the issue of a right to state-funded counsel at trial or on appeal, a point on which members of the court have been emphatic. This right has been addressed only at the appellate court level under section 7 of the *Charter*, as indicated above. The approach taken by the appellate courts in this context has been applied by the Supreme Court of Canada, not in a criminal case, but in *G.(J.), supra*, a civil case dealing with private sphere interests, the custody of children. It is crucial, though, that the Crown was the applicant in *G.(J.)*. The court held that J.G. could not have a fair hearing in a child protection proceeding if she did not have legal representation, as a result of her level of education and ability to function in the legal system. Given the seriousness of the interest at stake, she was entitled to publicly-funded counsel. Although the challenge had been brought to the New Brunswick domestic legal aid plan, which did not fund interim custody applications (as opposed to permanent wardship applications), the court held that the government could provide counsel in whatever way it chose (the government had amended the plan to cover custody applications brought by the Crown prior to the hearing before the Supreme Court).

In summary, the only constitutionally entrenched right to publicly-funded counsel has been established in the criminal context and the civil context where the Crown is involved. It should be noted that attempts have been made to establish a right to legal aid in private disputes without success: *Miltenberger v. Braaten*, [2000] S.J. No. 599 (Q.L.); *Ryan v. Ryan*, [2000] N.S.J. No. 13 (C.A.) (Q.L.); *Mills v. Hardy*, [2000] N.S.J. No. 386 (C.A.) (Q.L.). None of these decisions has addressed the matter in any detail, however, more or less assuming that *G.(J.), supra*, did not apply to private disputes.

ARGUMENTS FOR A CONSTITUTIONAL RIGHT TO LEGAL AID FOR CIVIL DISPUTES

The starting point for any consideration of an entrenched constitutional right to legal aid must begin with Lamer C.J.'s comments in *G.(J.), supra*. These comments reflect the unanimous view of the court in the cases to date:

The omission of a positive right to state-funded counsel in section 10, which, as I said in *Prosper*, should be accorded some significance, does not preclude an interpretation of section 7 that imposes a positive constitutional obligation on governments to provide counsel in those cases when it is necessary to ensure a fair hearing ... [T]he significance of the omission of a positive right to state-funded counsel under section 10 is that section 7 should not be interpreted as providing an *absolute* right to state-funded counsel at all hearings where an individual's life, liberty, and security is at stake and the individual cannot afford a lawyer. Accordingly, while a blanket right to state-funded counsel does not exist under section 10, a limited right to state-funded counsel arises under section 7 to ensure a fair hearing in the circumstances I have outlined above. [*emphasis in original*]

Since establishing a right to legal aid in the (private) civil context not only faces difficulties similar to those in the criminal context, but also raises its own difficulties, I am limiting my comments to the civil context and even more so, to the civil private context. The shared difficulties are that the court has consistently stated that there is no constitutional right to legal aid; it has also been reluctant to interpret the constitution as imposing a duty of positive action on governments; and it is wary of directing the government to expend significant amounts of money. The additional problem facing any effort to sustain an argument for a constitutional right to legal aid for private civil disputes is obviously the necessity of finding state action in the context of private disputes.

Arguments Based on Legal Aid Plan Comparisons and *G.(J.)*

There are some by now obvious arguments for extending existing legal aid (but not necessarily for establishing it, if it did not exist) which I will review quickly. Possible arguments to *extend* the right to civil legal aid are that sections 15 and 7 of the *Charter* require that legal aid plans maximize parity or equity between resources expended on criminal and civil legal aid; citizens of Canada should have access equivalent to the most advantageous plan; section 7 supports an extension of *G.(J.)*, *supra*, to other civil disputes; and a combination of express provisions and constitutional principles supports a right to legal aid or publicly-funded counsel in civil disputes. I will discuss the first three arguments only briefly, concentrating on the fourth.

It may be argued that existing legal aid plans are inequitable in failing to provide coverage in certain kinds of cases which particularly affect women, women and men from certain racialized communities and/or persons with disabilities without access to funds for a lawyer (for example). The objective would be to enlarge coverage of existing plans in a systematic fashion with the focus on the plans themselves. It would be necessary to make the argument in each jurisdiction, since the coverage of current plans differs from province to province. The result, depending on the jurisdiction, might be to include domestic matters, if they are not sufficiently covered, or administrative or immigration matters not now included in particular jurisdictions. The argument - the "intra-plan comparison" -

is that the plans contravene section 15 of the *Charter* because they grant greater coverage to criminal than to civil, including family, matters; or that the failure to include certain matters discriminates on the basis of ethnic origin, nationality or disability. This argument would be reinforced by the way in which the matters involved are of equivalent seriousness to the persons requiring legal aid, thereby establishing a link with the interests guaranteed by section 7 of the *Charter*. It requires a comparison of usage of the plans on the basis of sex and national origin, disability or other relevant grounds, the resources given to criminal and civil matters under the plans and the significance of the interests raised by the disputes involved. The required data are available under reports issued by legal aid plans, federal reports or other studies, although the data may have to be “disassembled” to understand fully how resources are allocated.

A variant of the intra-plan comparison is a comparison between the existing legal aid plans with narrower coverage and plans with broader coverage (the “inter-plan comparison”). This would, in effect, be a comparison based on province of residence, however, and the Supreme Court has recently affirmed that it does not consider province of residence to be a protected ground under section 15: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. In that case, both the majority and minority reasons (in agreement on outcome) recognized “aboriginality-residence” as an analogous ground. The majority cautioned, however, that ordinary Canadians were not as affected by their place of residence as were aboriginal persons affected by whether they lived on or off-reserve.

Rather than addressing discrepancies within or between plans in order to develop more comprehensive plans across the country over time, another approach is to extend the principles established in *G.(J.)*, *supra*, on a case-by-case basis, with the objective of extending the type of disputes which courts would recognize as requiring counsel. These would include welfare and other social benefit programs, immigration or deportation proceedings and similar types of disputes. A “*G.(J.)* analysis” should support extension of the right to state-funded counsel in cases where, for example, a welfare or public housing recipient’s physical or psychological security is at risk through a denial or withdrawal of benefits or eviction from housing and the individual has been refused counsel in arguing against the decision: see, for example, Patricia Hughes, “*New Brunswick (Minister of Health and Community Services) v. G.(J.): En Route to More Equitable Access to the Legal System*” (2000) 15 J.L. & Soc. Pol’y 93; and D.A. Rollie Thompson, “Annotation [to *G.(J.)*” (2000) 50 R.F.L. (4th) 74; on the section 7 interest in the deportation context, for example, see Russel P. Cohen, “Fundamental (In)Justice: The Deportation of Long-Term Residents from Canada” (1994) 32 O.H.L.J. 457. In many of these cases, if not most, the applicants would be impecunious and would not have the level of education or familiarity with the legal system necessary to represent themselves. Presumably, the complexity of the proceedings would vary. Although the Chief Justice stated in *G.(J.)*, *supra*, that he was limiting his comments to child protection

proceedings, this should not pose a bar to attempts to extend the application of *G.(J.)* which has obvious applicability to other forms of state action. This approach would, if successful, have the benefit of extending a constitutional right to publicly-funded counsel to some of the most disadvantaged of our citizens.

The advantage of the three approaches outlined above is that they involve state action, either because they are challenges to existing government instituted plans or legislation (or, even if there are not formal plans or legislation, to government action) or because they involve matters in which the state has acted in a manner to deprive the individual of benefits. They do not require government to establish new programs, nor to structure their programs in a particular way, but rather to implement existing programs in a manner which conforms to constitutional requirements. They may run afoul of the court's reluctance to direct government to spend extensive amounts of money, however.

But even if these challenges were successful, it would not establish a constitutional right to legal aid, merely the right to have certain matters covered under legal aid if legal aid exists (that is, to "rewrite" the legal aid plans to extend coverage) or to publicly-funded counsel if the judge orders counsel in the *Rowbotham/ G.(J.)* mode. The attempts to increase coverage under the legal aid plans themselves might result in greater coverage for private civil disputes, since the state action is found in the plan, not the dispute; for the *G.(J.)* analysis, however, the dispute requires state action and thus this approach is unlikely, at least in the short-term, to lead to publicly-funded counsel in the private arena. Indeed, it should be noted that although the court had been invited to take the opportunity to comment more broadly about the need for legal aid (by, for example, the factum filed by the Women's Legal Education and Action Fund), it did not do so.

A New Approach: Employing Constitutional Principles

What, then, might a different kind of argument look like? I suggest that a new approach employing foundational constitutional principles could allow the court a fresh basis for finding a constitutionally entrenched right to legal aid or, as I indicate below, at least a more broadly and systematically established right to publicly-funded counsel in the appropriate case. I will treat recourse to fundamental constitutional principles as a distinct and separate approach here in order to emphasize the argument, but it could also be used in conjunction with other approaches as a way of stressing the significance of access to the legal system as a *Charter* claim.

The foundational, fundamental or organizing constitutional principles provide the structure for and inform the interpretation of the written constitutional text: *Provincial Judges Reference*, [1998] 2 S.C.R. 217; *Québec Secession Reference*, [1998] 2 S.C.R. 217. They are "unwritten norms," in the language of Lamer C.J. in the *Provincial Judges Reference*, *supra*. Although the Supreme Court

employed constitutional principles prior to 1982, with the shift to constitutionalism at that time, they appear to have become more significant. They do not supplant the written text, but in this case, the argument is not to displace the written text, but to ensure that basic and fundamental aspects of our legal system and culture are respected. These principles include basic constitutional concepts such as democracy, federalism, the rule of law, judicial independence, respect for minority interests, full faith and credit and constitutionalism itself. I have argued elsewhere that a commitment to substantive equality should also be recognized as a fundamental constitutional principle: Patricia Hughes, “Recognizing Substantive Equality as a Foundational Constitutional Principle” (1999) 22 Dal. L.J. 5. A constitutional principle of substantive equality would have obvious relevance for establishing meaningful access to the legal system. Substantive equality means taking into account difference in order to obtain an equal result; it is not sufficient to treat people equally if that means treating them the same. The Supreme Court has said from the beginning that section 15 of the *Charter* guarantees substantive, and not merely formal, equality and therefore the court should be comfortable with the use of this terminology in non-*Charter* contexts: *The Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

It is first necessary to establish that meaningful access to the legal system is a constitutional value, a point to which I return below. Once that basic postulate is established, constitutional principles which require government to take into account difference when developing law and policy all contribute to an argument that determining whether there is meaningful access to the legal system must consider whether persons affected differently by the legal system also have meaningful access. These principles help inform the answer to the questions, “why do people need access to the legal system?” and “does their current level of access meet an acceptable standard?” In short, the answers to these questions require an equality analysis. An analysis employing constitutional principles to determine the answers to these questions would not be limited in the same way equality claims under section 15 of the *Charter*, however; while the approach developed by the court under section 15 (or any other explicit provision) would be of assistance in developing an analysis based on constitutional principles reflective of the written guarantees, the court is not bound by those parameters.

As indicated, the equality analysis is only part of the approach based on constitutional principles. It applies once it has been determined that meaningful access to the legal system is a constitutional right or value. Then the equality analysis helps to answer the question, “what does meaningful access require?” I want here to propose that the threshold question about meaningful access can be answered by the application of the constitutional principle of the rule of law, long recognized as a fundamental principle with legal force: *Roncarelli v. Duplessis*, [1959] S.C.R. 121. I merely note here that a more developed analysis would require a more complex consideration of these principles as interrelated and

informing each other, not a two stage process which I am employing for clarity in introducing this approach.

The Supreme Court has considered the meaning of the “rule of law” in several contexts, including the impact of the absence of positive laws in the *Manitoba Language Rights Reference*, [1985] 1 S.C.R. 721, the fact that officials are subject to the rule of law in *Roncarelli v. Duplessis*, *supra*, the protection it provides against arbitrary state action and the provision of “a stable, predictable and ordered society in which to conduct their affairs:” *Québec Secession Reference*, *supra*, at paragraph 71. There has been much consideration in the literature about the nature of the rule of law, particularly around whether it is a procedural or substantive concept: Margaret Jane Radin, “Reconsidering the Rule of Law” (1989) 69 Boston U. L. Rev. 781, 792; Ernest J. Weinrib, “The Intelligibility of The Rule of Law” in Allan C. Hutchinson and Patrick Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) 59; Allan C. Hutchinson and Patrick Monahan, “Democracy and the Rule of Law” in Hutchinson and Monahan, eds., *ibid.*, 97; Joseph Raz, “The Politics of the Rule of Law” (1990) 3 *Ratio Juris* 331. This argument does require developing an appropriate definition of or content for the rule of law within the context of Canadian political and legal culture. Given the court’s recognition in the *Québec Succession Reference*, *supra*, that the principles should evolve, I suggest that the rule of law should be defined as going beyond procedural protections to encompass substantive requirements about the relationship between law, access to law and a commitment to equality, including the requirement of meaningful access to the legal system and vindication of legal rights.

Meaningful access to the legal system begins with physical access to the courts themselves: *B.C.G.E.U. v. British Columbia (A.G.)*, [1988] 2 S.C.R. 214. In that case, the Chief Justice of British Columbia on his own motion enjoined picketing of the law courts during a legal strike, an action upheld by the Supreme Court of Canada. It must be observed that a commitment to the rule of law is part of the Preamble to the *Charter*. The importance of this in the context of *B.C.G.E.U. v. British Columbia (A.G.)*, *supra*, is that the union challenged the injunction as contravening *Charter* guarantees. Dickson C.J. (as he then was) stated for the majority that “the rule of law is the very foundation of the *Charter*.” (McIntyre J. agreed with the result and the applicability of the rule of law principle, but disagreed that the case raised the need for a *Charter* analysis.) The invocation of the rule of law did not rely on its presence in the Preamble; rather its placement there placed the union’s arguments in reliance on the *Charter* in a particular light.

The Chief Justice remarked at paragraph 24 of *B.C.G.E.U. v. British Columbia (A.G.)* that “it would be inconceivable that Parliament and the provinces should describe in such detail the rights and freedoms guaranteed by the *Charter* and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court.” As the Chief Justice pointed out at paragraph 25, “[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who

shall not have access to justice.” At paragraph 26 he adopted the following passage from page 406 of the decision of the British Columbia Court of Appeal (20 D.L.R. (4th) 399):

We have no doubt that the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. It is the preservation of that right with which we are concerned in this case. Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court. Here, the action causing interference happens to be picketing. As we have already indicated, interference from whatever source falls into the same category.

B.C.G.E.U. v. British Columbia (A.G.), *supra*, involved a physical impediment to entering the court buildings. But the relevance of the rule of law to issues of access is not limited to physical access, nor is the notion of access itself bounded by physical access. Simply being able to enter the court in order to vindicate rights is insufficient if a party does not realistically have access to the means by which the system can be understood. This is the underlying premise of the *ad hoc* approach in the criminal cases and *G.(J.)*, *supra*. The argument I make here, however, does not rely on Crown involvement in a case before claims can be made about adequate representation.

While I propose that this premise can be expanded in a more systematic fashion, it does not follow that everyone who is a party to a civil dispute is entitled to state-funded counsel. Rather, the criteria determining when a party should be entitled to publicly-funded counsel can be established using the *Charter* and other fundamental principles as a guide. The rule of law should be understood as incorporating *Charter* values; thus the meaning of the rule of law, so fundamental to our legal system, evolves. Furthermore, as guardians of the rule of law, judges must have the capacity to ensure that those involved in the legal system have meaningful access; this is the case with private disputes, as well as those which have a government nexus. It may also be argued that the law and the systems established to implement law derive from government's responsibility imposed by the rule of law. In Canada, this goes beyond the establishment of courts, but extends to the expectations about how courts operate. These expectations are satisfied both by the actions of judges and by the procedures established through legislation. The source of the rights individuals wish to vindicate and the means of enforcing those rights is government.

These observations may be more readily accepted in the context of criminal cases. Yet the ramifications of civil disputes often have serious implications for the physical and psychological integrity of the parties. In family cases, for example, the development of the law which is the result of both statute (government action) and judicial interpretation means that the economic security of a separated spouse or the degree to which a parent has a relationship with a child may well rely on the individual's capacity to prepare an adequate case and represent her or himself in court. The pre-*Charter* importance given to legal representation in criminal

cases acknowledged not only the fact that the “panoply” of the state was arrayed against the individual accused, but that the consequences of conviction could be extremely serious. Today we have acknowledged that interests which arise in the private sphere may be as serious: *G.(J.)*, *supra*; *B.(R.) v. Children’s Aid Society of Metropolitan Toronto*.

I have raised in bare bones form the basis of a novel argument for persuading the Supreme Court to acknowledge a broadly-based constitutional right to legal aid or publicly-funded counsel. Apart from the novelty of the argument, there are other reasons that the court might be reluctant to accept it. They include the court’s wariness of applying constitutional obligations in the context of private disputes, imposing positive obligations on government and requiring government to expend significant amounts of money; its reluctance to acknowledge economic status as the basis for granting rights; and the ambiguous legal status of the fundamental constitutional principles. I address these concerns next.

MEETING THE OBJECTIONS

Regardless of the approach, if the right is to apply to private disputes, it will be necessary to establish a nexus between private disputes and government. In short, the right needs to be based on recognition of the importance of *meaningful* access to a legal system which has been established by government, coupled with the importance of the consequences of inadequate access. I have touched on this issue above in discussing the role of government in establishing law and the means of enforcing it. I raise other ways of addressing this concern here.

One approach, based more on an extension of *G.(J.)*, *supra*, and the *Charter* than on the foundational principle approach is worth mentioning, however, since there is obviously a connection between the approach based on *G.(J.)* and that based on the constitutional principles. The argument is that persons in the position of those who might benefit from the extension of *G.(J.)*, *supra*, should not be further disadvantaged by the fact that the government has “contracted out” services they require to private entities. Following *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, the *Charter* applies not only to government and to entities that “look like” government, but also to entities which are carrying out significant government policy. In short, the government ought not escape the requirements of the *Charter* by delegating to private entities responsibility to implement significant government policy, such as health care. As I have argued elsewhere (Hughes, 2000, *supra*), the state has provided some private actors with the means to profit from providing services to vulnerable individuals; this is the case with many tenants of boarding houses, for example (see E. Mahoney, “Disabling Tenants’ Rights” (1997) 25 O.H.L.J. 711). The government action in this regard has had a disproportionate impact on persons with disabilities who are unable to properly exercise their rights under tenant protection legislation. Were the government responsible for their housing, they would have a claim to legal

representation under *G.(J.)*, *supra*, but now they are involved in a private dispute where *G.(J.)*, *supra*, does not seem to apply.

More broadly, even if *Eldridge*, *supra*, does not apply directly, it is important here because it represents a broader understanding of how certain kinds of processes should be subject to the requirements of the constitution. *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, which involved a private defamation suit based on common law with no government involvement, establishes a similar principle where the *Charter* itself might not be applicable. Thus while the *Charter* applies neither to private disputes nor to the common law without government involvement, *Charter values* apply to the common law governing private disputes (also see *A.M. v. Ryan*, [1997] 1 S.C.R. 157). The application of constitutional principles, such as the rule of law, should, it can be argued, also reflect the values inherent in the *Charter*.

The second and third concerns, imposing a positive obligation on government and requiring governments to spend large amounts of money, are related. These concerns must be understood in the context of the on-going debate about the proper constitutional roles of the courts and legislatures or executives. In finding a balance between judicial activism and restraint, the court has been reluctant to read the constitution to require positive action on the part of the government, except where it is necessary to meet deficiencies in existing programs: see *Ferrell v. Ontario (Attorney General)*, [1998] O.J. No. 5074 (C.A.) (Q.L.); *lv. to appeal dismissed*, [1999] S.C.C.A. No. 79 (Q.L.); *Haig v. Canada*, [1993] 2 S.C.R. Specifically in relation to legal aid or publicly-funded counsel, Lamer C.J. said in *Prosper*, *supra*, that:

it would be a very big step for this court to interpret the *Charter* in a manner which imposes a positive constitutional obligation on governments. The fact that such an obligation would almost certainly interfere with governments' allocation of limited resources by requiring them to expend public funds on the provision of a service is, I might add, a further consideration which weighs against this interpretation.

In *G.(J.)*, *supra*, he avoided the justification put forward by the government that they needed to limit legal aid expenditures by finding that the savings were minimal and that the parent's right to a fair hearing "outweighs the relatively modest sums ... at issue in this appeal." The Alberta Court of Appeal in *Rain*, *supra*, commented that "the courts are not the best qualified, if they are qualified at all, agencies to determine spending priorities for public funds in this area." David Schneiderman and Charalee F. Graydon acknowledged this difficulty in the criminal context in "An Appeal to Justice: Publicly-Funded Appeals and *R. v. Robinson; R. v. Dolejs*" (1990) 28 Alta. L. Rev. (No. 4) 873. Despite the court's reluctance to impose a positive obligation on government, however, it will do so, in order to make a right meaningful: *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627. The argument here is that to make access to the legal system meaningful, as required by the rule of law, the court must impose on government

the obligation to ensure that indigent individuals are provided with legal representation.

Similarly, while cost or administrative inconvenience in itself is not a justification for failing to abide by the constitution, the court has commented many times about the inappropriateness of the judiciary's telling government how to spend money: *Schacter v. Canada*, [1992] 2 S.C.R. 679. In a variant of this outlook, failure to fund programs has generally not been considered to contravene the *Charter*, except where it can be seen as incidental to the denial of another clearly guaranteed right, such as provision of education in the minority official language, the situation in *Mahe v. Alberta*, [1990] 1 S.C.R. 342.

Given this reluctance and the reality that a legal aid system would be costly, it may be necessary to consider gathering data to show that it is less costly to have parties represented in court than otherwise or that the cost factor is of less significance than governments claim. The cost argument is not insignificant, but would play a lesser role, in a judicially determined publicly-funded system than with a comprehensive legal aid program.

It should also be recognized that the concept of "legal aid" imputes a systemic program setting out coverage which is always available to impecunious applicants who meet the eligibility requirements. To hold that the constitution *requires* legal aid means that the Supreme Court would have to order governments to institute programs with considerable cost implications. Assuming that the court is amenable to a more extensive constitutionally entrenched right to legal representation (to rephrase the issue we have been asked to address), it may be more palatable to build on the publicly-funded counsel where required for a fair trial model. Over time, this could well develop into a more systematic arrangement which would not require impecunious parties to make application to the court if refused assistance by legal aid.

It cannot be avoided that the issue of a constitutional right to legal aid requires us to acknowledge, as a constitutional matter, that some people are denied equal access to the legal system – are denied meaningful access to the legal system – because they are poor. They are denied by virtue of economic status meaningful access to one of the institutions which characterize our identity as a nation by the failure of government to conform to the requirements of the rule of law. The courts have been reluctant to acknowledge economic circumstance as an analogous ground under section 15 (consistent with the view that the *Charter* is not an economics rights document, even though certain kinds of economic rights are indirectly protected, such as commercial advertising). In this case, however, the court would not be bound by its interpretation of section 15 nor by its understanding of the nature of the *Charter*. Furthermore, as indicated above, it is not economic status alone which is determinative here, but also the interrelation of economic status and other characteristics which affect why people require access to law. Although section 15 is not at issue in this argument, except to the

except it may be combined with a constitutional principle approach, the concepts developed by the Supreme Court under that section resonates here. The lack of meaningful access to the legal system -- a denial of access to principles of fundamental justice -- with consequences which are invasive of both physical and psychological stress, results in treating people who are unable to afford lawyers to make their legal rights effective as if they are not equally meritorious or are lacking in human dignity: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

The last objection I will address is the legal status of the constitutional principles. The rule of law was recognized as a convention in the *Manitoba Language Rights Reference*, [1985] 1 S.C.R. 721. Conventions are not legally enforceable. Apart from the fact that there is an interrelationship between conventions and principles (*Patriation Reference*, [1981] 1 S.C.R. 753, at 905), there is no doubt that the rule of law also has the status of a constitutional principle, arising out of the Preamble to the *Constitution Act, 1867: Québec Secession Reference*, *supra*, at paragraph 70. Although the court was ambiguous and ambivalent about its willingness to hear about failures to abide by constitutional principles in the *Québec Secession Reference*, *supra*, it nevertheless termed the constitutional principles, including the rule of law, as legal obligations to which governments must conform. At paragraph 54, the court said, “Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have ‘full legal force’ [citation omitted]), which constitute substantive limitations upon government action.” The rule of law was most famously enforced in *Roncarelli v. Duplessis*, *supra*. The ambiguity in the *Québec Secession Reference*, *supra*, about whether the court would enforce the constitutional principles can be explained, I suggest, by the court’s reluctance to “micro-manage” the terms of and implementation of a referendum on the independence of Québec. Even though in practice it might be difficult in the circumstances of a referendum to determine where the line has been crossed, micro-managing what is essentially a political debate is quite different from arguing that basic constitutional principles have not been satisfied. Furthermore, the court has enforced constitutional principles in a number of contexts: see *Provincial Judges Reference*, *supra*, for a discussion of these cases.

CONCLUSION

To date, the Supreme Court of Canada has been firm in its conclusion that the constitution does not require governments to establish legal aid programs, even with respect to criminal accused. This is consistent with their reluctance to compel governments to establish programs and to direct significant expenditures of money. The court is prepared to find a right in section 7 of the *Charter* to publicly-funded counsel where the state has imposed psychological stress on a parent in child protection cases, under certain circumstances. It is not unreasonable to assume that the court equally supports a section 7 right to publicly-funded counsel in criminal cases, although it has not said so, and that

arguments to apply this analysis in other cases involving state action which results in stress would be successful. Accordingly, it may be extremely difficult to argue successfully for a constitutional right to legal aid, even where the state is involved, but not unrealistic to think that arguments that the section 7 analysis should be applied to a broader range of cases would be successful in cases involving the state. Far more difficult than either would be to establish a constitutional right to legal aid in private disputes because of the apparent lack of state action. Trying to extend the availability of legal aid is always an option, but that is not the same as establishing that legal aid is required by the constitution. I have developed the outlines of a new argument based on an analysis which seeks to address the question of state action, as well as raises an approach which has not yet been employed to establish a constitutional right to publicly-funded counsel. In my view, it is only through a new approach that such a right can be established.

Les aspects constitutionnels du droit à l'aide juridique au Canada en matière autre que criminelle : une question de sécurité humaine

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BREF HISTORIQUE DU DROIT À L'AIDE JURIDIQUE AU CANADA ET AU QUÉBEC

1. Au Canada, deux principaux facteurs politiques permettent d'expliquer le développement de mesures sociales au cours des années 70. D'une part, l'agenda de la lutte à la pauvreté dominait la scène politique, avec, entre autres, comme préoccupation, le rapport des pauvres au droit. D'autre part, le Canada, mais surtout le Canada anglais, a subi l'influence positive des luttes menées aux États-Unis pour les *Civil Rights and Liberties*; quant au Québec, il a plutôt choisi à titre de référence les développements en matière de droits de la personne sur la scène internationale (adoption et entrée en vigueur des Pactes sur les droits civils, politiques, sociaux, économiques et culturels). L'instauration de régimes provinciaux d'aide juridique ou d'assistance judiciaire participe à cette double logique et l'évolution plus récente de ces régimes en témoigne aussi.
 - Dennis Guest, *Histoire de la sécurité sociale au Canada*, Boréal, 1993, p. 229 et suiv.;
 - Jean Héту et Herbert Marx, *Droit et pauvreté au Québec*, Les Éditions Thémis, 1974, p. 467 et suiv.;
 - L. Taman, *La controverse au sujet des services juridiques : examinons les preuves*, Ottawa, Bureau national du bien-être social, 1971.
2. Comme pour plusieurs autres mesures sociales, le démarrage des systèmes d'aide juridique au Canada a reposé sur une entente de financement partagé

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entre le gouvernement fédéral et les gouvernements provinciaux et territoriaux. Ce mode de financement, toutefois, illustre une tendance initiale forte en faveur du modèle américain de “Judicare” où des avocats de la pratique privée sont payés à l’acte pour effectuer des représentations devant les tribunaux en matière criminelle et pénale. Citons, à titre d’exemple, l’Entente de 1973 conclue entre le gouvernement fédéral et la province de Québec laquelle (1) autorise la province à dispenser des services d’aide juridique dans certaines matières criminelles et (2) exige de la province qu’elle prenne toutes les mesures raisonnables pour faire en sorte qu’une personne admissible à l’aide juridique et qui est détenue ou arrêtée ait la possibilité d’obtenir rapidement les services d’un avocat (art. 3).

3. Ce modèle de financement partagé n’a pas empêché les provinces d’adapter les systèmes d’aide juridique, tant du point de vue de la couverture des services offerts aux personnes économiquement admissibles que de celui des modes d’administration des régimes d’aide juridique. Le Québec, par exemple, renonçant explicitement au modèle américain, a choisi d’établir un réseau mixte composé de cliniques juridiques communautaires et de bureaux d’aide juridique publics, ces derniers étant autorisés, au-delà de leur propre pratique, à émettre des certificats (ou mandats) d’aide juridique au bénéfice des représentations à l’acte fournies par les avocats de la pratique privée. L’Ontario, pour sa part, a choisi de partager l’offre de services entre la pratique privée et les cliniques juridiques en fonction du domaine de droit concerné, à toutes fins pratiques. D’autres provinces s’en sont tenues à l’origine à la stricte couverture des services en droit criminel et ont choisi de confier aux Law Societies la gestion de l’émission et des conditions d’émission des certificats à la pratique privée.
4. La présente opinion ne souhaite pas s’attarder directement aux effets des choix en matière de mode de livraison des services d’aide juridique ou à ceux découlant de la détermination des conditions économiques d’admissibilité. Elle s’intéresse d’abord au contenu *rationae materiae* de ce droit (la couverture des services) en matières autres que criminelle. Dans cette perspective, et ce avant d’aborder plus strictement la question des garanties constitutionnelles dont pourrait bénéficier le “droit à l’aide juridique,” il est utile de définir en fonction de quels principes s’est déployée (relativement) l’assiette de services couverts. Il est d’usage de procéder à l’analyse des services d’aide juridique couverts par les diverses législations canadiennes en fonction de trois types de services : le droit criminel, le droit familial et les autres droits civils. C’est la méthodologie à laquelle recourent habituellement les Law Societies du Canada ou les Commissions d’aide juridique aux fins de la confection de leur rapport annuel. Toutefois, cette catégorisation nous apparaît insatisfaisante et doit être raffinée.
 - Voir à titre d’exemple, *L’aide juridique et les pauvres*, Rapport du Conseil national du bien-être social, Hiver 1995, p. 45.

LES FONDEMENTS LÉGISLATIFS ET ADMINISTRATIFS ACTUELS DE LA COUVERTURE D'AIDE JURIDIQUE AU CANADA

5. Les systèmes provinciaux d'aide juridique ont été soumis à des pressions importantes, du point de vue de la demande, au cours des années 80. Il semble que les administrateurs de ces régimes en soient venus à identifier deux sources principales de tension. D'une part, l'introduction de législations destinées à la protection de personnes issues de groupes ciblés (les enfants, les personnes incapables, par exemple) ou à la protection du public (les jeunes contrevenants) engendraient des besoins de représentation juridique *apparentés* à ceux qui, dès l'origine des régimes d'aide juridique, avaient justifié la mise en place de réseaux d'aide juridique. On assimilait ainsi le besoin de représentation de personnes susceptibles d'être privées de leur liberté ou brimées dans l'exercice de leur liberté dans des contextes autres que celui du droit criminel aux besoins de "l'accusé." D'autre part, la lutte des femmes pour l'égalité et contre la violence, a permis de mettre en lumière leur extrême vulnérabilité et celle de leurs enfants, surtout en situation contrainte ou choisie de rupture matrimoniale. Dans tous les cas, les régimes d'aide juridique ont dû prendre acte d'un élargissement *de facto* du concept de "liberté" et de "sécurité" physique et psychologique et tenter de réconcilier l'approche classique du droit à l'assistance judiciaire avec les besoins de la société canadienne. Le passage qui suit illustre cette réflexion :

A comprehensive review of the legal aid program was carried out during 1987/88 by a task force [...]. Their report noted that the legal environment had changed vastly since the early 1970s when the program was implemented. In their view the *Young Offenders Act*, the *Child Welfare Act*, the *Maintenance Enforcement Act*, and the *Charter of Rights and Freedoms*, and other legislation, had "profoundly altered the legal context within which the Legal Aid Society operates." The report suggested a "fundamental reorganization of the structure and priorities of the society." [...] The task force did, however, largely reject the idea that the legal aid society should focus on "poverty law" which might include, for example, representation before administrative tribunals, the pursuit of class action suits in which low income individuals are affected, and advocacy by groups that could not otherwise afford the cost of doing so. They concluded that the plan and the society should instead continue to offer its traditional criminal and civil coverage. [...] The task force was strongly of the opinion that the legal aid society was "not an agency of social change."

- *Legal Aid Services in Alberta, 1973-1998*, Linda Janzen, The Legal Aid Society of Alberta, 1999, en ligne à : <http://www.legalaid.ab.ca/history/page09.htm>.

6. Depuis les années 70, la tendance dominante, mais non exclusive, dans l'élargissement des services couverts par les régimes d'aide juridique a donc été de procéder à de tels élargissements plus ou moins généreux en fonction du nombre de nouvelles situations de risques juridiques s'apparentant à la privation de liberté ou à l'atteinte à la sécurité selon les standards du droit criminel. Seul le Québec et le Manitoba ont opéré des choix différents.
7. En y regardant de plus près, on constate que l'évolution des divers régimes canadiens d'aide juridique s'est faite en fonction de trois modèles dominants que nous nommons comme suit : le modèle restrictif, énumératif et universel.

Le modèle restrictif

8. À titre d'exemple, le *Legal Services Society Act* de la Colombie-Britannique (R.S.B.C., 1996, ch. 256) prévoit qu'en matière autre que criminelle, les différends prenant vie dans la sphère domestique ou familiale et qui peuvent affecter la santé physique ou mentale d'un individu ou des enfants pourront donner lieu à l'émission d'un certificat d'aide juridique. Cette couverture se limitera en l'espèce aux mesures d'urgence requises afin d'écarter la menace (art. 3(2)(c)). De même tout autre problème juridique pouvant constituer pour l'individu ou sa famille un risque pour sa santé physique ou mentale ou susceptible de porter atteinte à sa capacité de combler ses besoins essentiels (nourriture, vêtements, logement) ou de veiller à sa subsistance sera susceptible de faire l'objet de l'émission d'un certificat d'aide juridique (art. 3(2)(d)). Les décisions prises aux fins de l'émission du certificat d'aide juridique ne sont pas susceptibles de révision administrative et le libre choix à l'avocat n'est pas assuré. Ce modèle n'exclut d'entrée de jeu aucun domaine de droit mais limite l'ensemble de la couverture, en matière autre que criminelle, aux situations immédiates susceptibles de constituer un risque pour la santé physique et psychologique des demandeurs. Par ailleurs, ce modèle doit être compris à la lumière de l'article 11 (2) du *Legal Services Society Act* qui stipule qu'il est interdit à la Commission des services juridiques de terminer un exercice financier en déficit budgétaire.
9. Par ailleurs, une étude récemment menée pour le compte du B.C. Access to Justice Committee révèle à quel point le modèle privilégié par la Colombie-Britannique (modèle restrictif), couplé aux importantes pressions budgétaires auxquelles est soumis le régime, constitue une menace sérieuse pour les groupes de personnes les plus susceptibles de devoir y recourir, dont les femmes. Somme toute, le modèle restrictif privilégié par la Colombie-Britannique remet entièrement entre les mains des administrateurs du régime le soin de déterminer ce qui constitue une atteinte à la santé physique et psychologique des bénéficiaires potentiels. Cela accroît d'autant l'insécurité juridique de groupes hautement vulnérables. Donc, même si,

ainsi que nous l'avons noté plus haut, tous les domaines du droit paraissent d'emblée couverts, dans les faits, les exclusions sont souvent nombreuses.

- Voir The Law Society of British Columbia, Final Report to the Access to Justice Committee, Viki Trerise, July 2000, *Where the Axe Falls : The Real Cost of Government's Cutbacks to Legal Aid*, p. 61 en ligne à : lawsociety.bc.ca.

Le modèle énumératif

10. Le *Legal Aid Services Act* de l'Ontario (S.O. 1998, ch. 26) prévoit à l'article 13 que des services d'aide juridique sont offerts aux personnes économiquement admissibles dans les domaines du droit criminel, familial, en matière de santé mentale et enfin, de droit communautaire (clinic law). En fait, et selon les informations obtenues, le droit communautaire pratiqué dans les cliniques est réservé aux personnes qui, en raison de leur besoin juridique, ne peuvent pas bénéficier d'un certificat d'aide juridique destiné à la pratique privée et qui ont un problème juridique dit de droit social (logement, chômage, sécurité sociale, pensions, droits de la personne). C'est par directives que la corporation des services juridiques établira des situations prioritaires pour lesquelles des services juridiques seront offerts et des certificats d'aide juridique émis. Ces choix prioritaires sont explicitement fondés sur des considérations budgétaires. Ainsi, en matière familiale les services suivants sont jugés prioritaires : l'attribution et le changement de garde d'enfants, la fixation et la modification des ordonnances alimentaires, l'accès aux enfants, la recherche d'ordonnance de non harcèlement ou de cessation d'atteinte à la propriété familiale ou personnelle de la part du conjoint et la négociation du partage des éléments du patrimoine familial susceptibles de garantir à la requérante un revenu de base. De même, les litiges émanant de la protection de la jeunesse (placement temporaire des enfants, par exemple) sont jugés de la plus grande importance aux fins de la détermination des services couverts.
11. Le modèle énumératif, contrairement au modèle restrictif, procède d'une double logique. D'abord, la Loi établit quatre grandes catégories à l'intérieur desquelles des services juridiques pourront être offerts. Puis, en ce qui concerne le droit familial (catégorie dans laquelle il faut inclure les services destinés à la protection de l'enfance) et celui de la santé mentale, l'administration de la Loi limite les services offerts à des situations dites prioritaires. Les cliniques juridiques, pour leur part, veilleront en fonction de leurs ressources à établir des priorités et pourront affecter des ressources à des services juridiques autres que ceux assimilés à la représentation des clients, dans des domaines dits de droit social. Selon un récent rapport, ce dernier domaine du droit souffre de carences graves au chapitre des ressources.

- Voir : *Report of the Ontario Legal Aid Review, A Blueprint for Publicly Funded Legal Services*, 2000, en ligne :
<http://www.attorneygeneral.jus.gov.on.ca/html/OLAR/olarcvr.htm>.
12. Il est à noter que pour certaines provinces ayant adopté l'approche énumérative, l'offre de services est beaucoup plus restrictive que dans le cas de l'Ontario bien que le cadre législatif soit aussi assorti de directives destinées à établir une liste de situations prioritaires. On exclura, par exemple, la représentation en matière de protection de la jeunesse ou toute fonction de "conseil."
- Voir à ce sujet Patricia Hughes, "New Brunswick's Domestic Legal Aid System: *New Brunswick (Minister of Health and Community Services) v. J.G.*" (1998) 16 Windsor Y.B. Access Just. 240; et LEAF-New Brunswick, *Civil/Domestic Legal Aid National Strategy Workshop*, Materials, October 1996.

Le modèle universel

13. Les législations du Québec et du Manitoba, très similaires, sont fondées sur le principe de la quasi-universalité des services d'aide juridique couverts. Ainsi, l'article 11(1) de la *Loi sur la société d'aide juridique du Manitoba* (RSM, 1987, ch. L105) stipule que le directeur régional peut fournir des services juridiques à une personne qui y est admissible (b) dans une instance civile, y compris une instance introduite devant un organisme quasi-judiciaire ou administratif. L'article 4.7 de la *Loi sur l'aide juridique du Québec* (L.R.Q. c. A-14) prévoit pour sa part une longue liste de situations en matières autres que criminelle pour lesquelles des services d'aide juridique sont disponibles aux personnes économiquement admissibles. Cette liste est suivie d'une clause de sauvegarde (art. 4.6 (9)) prévoyant en plus que pour toute autre affaire, l'aide juridique sera disponible si elle met en cause la sécurité physique ou psychologique d'une personne, ses moyens de subsistance, ses besoins essentiels et ceux de sa famille. De plus, l'article 4(10) de la Loi québécoise prévoit que l'aide juridique sera accordée aux fins des ententes à être conclues avec le directeur de la protection de la jeunesse, même dans les cas où le placement de l'enfant n'est pas en cause.
14. Cependant, en toute autre matière qu'en droit criminel, la loi manitobaine et la loi québécoise prévoient que l'aide juridique pourra être refusée ou retirée selon certains facteurs, en considérant le rapport habituel entre un client et un avocat. Au nombre de ces facteurs, on retrouve dans les deux cas (L.R.Q. c. A-14, art. 4.11 et R.S.M. 1987, ch. L105, art. 16(1)) :
- les chances de succès de l'affaire;
 - l'accessibilité d'un service juridique autre que l'aide juridique;
 - les coûts déraisonnables de l'affaire par rapport aux gains escomptés;

- le refus du client d'accepter un règlement raisonnable.

15. A l'autre bout du spectre de l'universalité, il convient aussi de considérer le modèle albertain. En Alberta :

The Legal Aid Society may provide legal aid to a resident Albertan who is a financially eligible applicant in respect of any civil matter where
 (1) the matter is subject to the jurisdiction of the courts,
 (2) a reasonable person of modest means would commence or defend the action, and

- (3) in the opinion of the Legal Aid Society
 (a) the legal cost of commencing or defending the action is reasonable when compared to the relief sought, and
 (b) the matter has merit or a likelihood of success, or both, and
 (c) where circumstances, at the time of the application, warrant coverage.

- Source : <http://www.legalaid.ab.ca/tariff/Frame.htm>.

16. Une analyse sommaire des chiffres issus des rapports annuels des organismes responsables de la gestion des régimes d'aide juridique, révèle que le choix du modèle n'est pas nécessairement garant des résultats. En Alberta, par exemple, et ce malgré l'absence d'exclusion spécifique de quelque type de causes, les chiffres démontrent en pratique une exclusion totale des causes qui ne sont pas issues du droit familial ou criminel (34 certificats pour l'année 2000). En Ontario, le droit familial représentait pour l'année 1997 environ 20% de l'ensemble des certificats émis et les autres causes civiles (parmi lesquelles il faut inclure le droit social), à peine 6%. Le meilleur équilibre semble émaner du système québécois. Ainsi, pour l'année 2000, la pratique combinée des cabinets privés et des bureaux d'aide juridique a représenté : 19% de droit civil et social, 29% de droit familial, 12% de protection de la jeunesse et 34% de droit criminel (y compris la *Loi sur les jeunes contrevenants*). En ce qui concerne les refus (représentant 14% du total des demandes), l'analyse des chiffres révèle qu'un refus sur deux en matière civile ou sociale repose sur les critères discrétionnaires prévus par la Loi (art. 4.11 (2), (3), (4) et (5)).

- *2000 Legal Aid Society of Alberta Report*, en ligne à : <http://www.legalaid.ab.ca/ar2000/default.htm>;
- *Ontario Legal aid Plan, Annual Report 1997*, en ligne à : <http://www.legalaid.on.ca/Publications/EngRep97.pdf>;
- *Commission des services juridiques, 28^e Rapport annuel, Mars 2000*, en ligne à www.csj.qc.ca, p. 24 et 83.

17. Ce bref survol de la situation de l'aide juridique au Canada permet de dégager certains principes qu'il conviendra de garder à l'esprit lorsque se pose la question de savoir s'il existe en droit canadien un droit

constitutionnel à l'aide juridique en matière autre que criminelle. Résumons-les comme suit :

- Au-delà du fait que le modèle retenu privilégie une approche universaliste, énumérative et restrictive au chapitre de la couverture de services offerts, plusieurs législations ont intégré à la notion de “services couverts” le besoin d’offrir des services d’aide juridique aux personnes et aux familles dont la sécurité physique, et aussi parfois économique, est compromise;
- Certaines législations limitent ce risque de compromission aux situations susceptibles d’entraîner une privation de liberté, au sens analogique du droit criminel;
- En matière de droit familial, la couverture des services offerts, dans le modèle énumératif surtout, est guidée et déterminée en fonction des mesures urgentes à être entreprises, souvent sans égard aux conséquences préjudicielles d’un tel découpage pour la sécurité économique de la partie la plus faible;
- Voir Condition féminine Canada, *Un pied dans la porte : les femmes, l’aide juridique en matière civile et l’accès à la justice*, 1998, Lisa Addario, en ligne : <http://www.swc-cfc.gc.ca/publish/research/addario-f.html>;
- En matière de protection de la jeunesse, l’urgence, la gravité et le risque d’atteinte à la sécurité des familles et des enfants semblent être déterminés d’abord en fonction du risque que l’enfant soit retiré de sa famille;
- En matière de droit social (défini comme toute autre cause que les affaires familiales ou les litiges purement privés), et sauf pour le Québec et le Manitoba, aucun principe ne se dégage dans la mesure où malgré les caractéristiques typologiques de la Loi examinée, les chiffres révèlent une exclusion systémique explicite ou implicite du domaine du droit social de la couverture des services;
- D’un point de vue politique et moral, les législations d’aide juridique au Canada ont donc évolué en fonction de la reconnaissance partagée du caractère inadmissible de certaines vulnérabilités : la violence et la privation de liberté. Ce processus d’identification est pour sa part ciblé en fonction de groupes de citoyens plus particulièrement vulnérables : les femmes et les enfants. L’ajout à cette courte liste d’autres principes partagés serait périlleux;
- L’identification de principes partagés ne doit pas être comprise comme un gage de bon fonctionnement des systèmes d’aide juridique. Ainsi, cette analyse écarte les conséquences négatives pour les bénéficiaires et issues des effets de dysfonctionnement des systèmes d’aide juridique : les délais, la complexité administrative, la qualité des services, les garanties relatives au libre choix de l’avocat en matière autre que criminelle;
- Enfin, et ce sans égard au domaine de droit concerné, il faut constater que les législations les plus universalistes sont aussi celles qui prévoient explicitement la possibilité d’un refus de l’aide juridique lorsque

d'autres services juridiques sont accessibles afin de répondre au besoin juridique du demandeur (conciliation, médiation, information, conseils). Il pourrait donc y avoir un lien utile à dégager du binôme universalité-autres mécanismes de justice.

18. Dans les faits, et ce conformément au domaine des droits de la personne, les législations canadiennes en matière d'aide juridique évoluent vers la reconnaissance du lien incontestable entre la sécurité et la liberté humaine et l'accès effectif à la justice. Ce cheminement, cependant, n'a pas été, à l'évidence, guidé tant par les standards des droits de la personne que par l'urgence et les contraintes budgétaires. Il est aussi le prolongement ou l'extension du principe qui fut à l'origine des modèles : la protection des droits civils et politiques ou dit autrement, l'extension au privé (violence) du besoin de contrôler les ingérences abusives de l'État et d'accéder utilement à la justice à cette fin. L'approche adoptée par les différents législateurs est donc non seulement insatisfaisante mais aussi inquiétante, du point de vue des droits de la personne.
19. À cette fin et compte tenu des termes de l'article 7 de la *Charte canadienne des droits et libertés*, il convient d'explorer plus attentivement le concept de "sécurité humaine" dont les récents développements affirment plus solidement que jamais le lien entre la dignité humaine et l'exercice effectif des droits de la personne. En effet, l'aide juridique participe de ces mécanismes destinés à un tel exercice dans tous les domaines où la sécurité humaine est compromise.

LA SÉCURITÉ HUMAINE : INFLUENCES DES CONCEPTS ISSUS DES INSTITUTIONS INTERNATIONALES ET RÉGIONALES

20. L'Organisation internationale du travail (O.I.T.) a récemment mis sur pied le Programme focal sur la sécurité socio-économique (S.E.S.). Selon l'O.I.T., dont la mission est centrée sur les droits des travailleurs et des travailleuses, l'insécurité humaine doit être combattue à partir de sept zones d'intervention : l'emploi, le marché du travail, la stabilité de l'emploi, les conditions de travail, l'apprentissage, le revenu et enfin, le droit de représentation. Dans le contexte de ce programme, l'objectif recherché est bel et bien la sécurité économique de tous, entendu comme une composante de la dignité humaine et une pré-condition de l'exercice des libertés individuelles.
 - Voir en ligne : <http://www.ilo.org/public/french/protection/ses/index.htm>.
21. En 1998, le Conseil de l'Europe a rendu public le *Rapport sur la cohésion sociale*, résultat des travaux du groupe de travail *Dignité humaine et*

exclusion sociale, fondé en 1994. Pour le Groupe de travail, la sécurité humaine repose sur cinq piliers : la santé, l'éducation, le logement, l'emploi et la protection sociale.

- Voir en ligne : http://www.social.coe.int/default_en.htm.
22. Le Rapport mondial sur le développement humain du Programmes des Nations Unies pour le développement (P.N.U.D.) pour l'an 2000 énonce pour sa part que les sources de l'insécurité humaine sont les suivantes : les menaces émanant de l'État; celles émanant d'autres États ou d'autres groupes de personnes et les menaces à l'encontre des femmes et des enfants. Pour le P.N.U.D., le principe de légalité est essentiel à l'éradication des conditions d'insécurité ET l'accès à la justice est un élément important de ce principe.
- Voir P.N.U.D., *Rapport mondial sur le développement humain 2000*, Développement et droits humains, en ligne : <http://www.undp.org/hdr2000/french/HDR2000.html> (p. 35 et 68).
23. En 1998, la Banque mondiale a rendu public le rapport *Développement et droits de l'homme, le rôle de la Banque mondiale*. Selon la Banque, aucun droit de l'homme ne peut être garanti sans un système judiciaire solide, indépendant, impartial et *accessible*.
- Voir en ligne : <http://www.worldbank.org/html/extdr/rights/hrtextfr.pdf>, p. 18.
24. En 2000, la Banque mondiale proposait dans son rapport sur le développement dans le monde, intitulé *Combattre la pauvreté*, que l'accent soit mis sur la sécurité matérielle à titre de stratégie prioritaire de lutte contre la pauvreté. La Banque y propose une définition de la sécurité matérielle qui dépend de la capacité des pauvres de bénéficier des mécanismes destinés à atténuer les conséquences des chocs économiques, des catastrophes naturelles, de la mauvaise santé, de l'invalidité, et de la violence. Parmi ces mécanismes, il faut compter les mécanismes d'accès à la justice.
- Voir en ligne : abrégé du Rapport, <http://www.worldbank.org/poverty/french/wdrpoverty/index.htm#Abr>, p. 7.
25. Les chercheurs canadiens, pour leur part, ont mis au point un indice de sécurité personnelle (I.S.P.). Cette mesure innovatrice compare les données statistiques sur l'économie, la santé et la criminalité (l'indice des données) à l'information tirée de sondages sur la perception des Canadiens concernant leur situation dans ces trois domaines (l'indice de perception).

- Voir Conseil canadien de développement social:
<http://www.ccsd.ca/francais/pubs/2001/psi2001/pr.htm>.
26. L'insécurité naît donc lorsque les conditions environnementales, sociales, économiques, et personnelles empêchent une personne de jouir tout autant des attributs de son individualité que de sa liberté. L'insécurité est la misère d'une personne *située* dans le temps et dans l'espace et évoque des rapports à la société et à l'État. L'insécurité de la personne est le contraire de l'affirmation faite par l'article 3 de la *Déclaration universelle des droits de l'Homme*, laquelle propose pour sa part une sécurité dépendante de l'ensemble des droits de la personne.
 27. La protection de la sécurité humaine n'est donc pas strictement une question de "droits économiques." Elle est avant tout l'évocation d'une condition humaine digne qui exige la satisfaction des besoins de base. C'est pourquoi, dans le contexte de l'article 7 de la *Charte canadienne*, il faudrait prendre garde de réduire le débat relatif à la protection de la sécurité de la personne à la seule protection des droits économiques et sociaux.
 28. Dans l'affaire *Irwin Toys* ([1989] 1 R.C.S. 1003-4), la Cour suprême du Canada tirait d'ailleurs du fait de l'omission des droits économiques dans la *Charte* (et plus particulièrement du droit de propriété) deux intéressantes conclusions. D'abord, l'exclusion du droit de propriété de la *Charte* signifie l'exclusion des droits économiques (*Economic rights*) entendu comme ces droits qui protègent la propriété contre les interventions abusives de l'État. Ensuite, l'exclusion du droit de propriété de l'article 7 de la *Charte* ne signifie pas nécessairement, selon la Cour, l'exclusion de la protection des droits de la personne susceptibles d'assurer la sécurité économique des personnes (nous reformulons). Parmi ces droits, la Cour évoquait notamment le droit à la nourriture, au logement et à la sécurité sociale, à titre de droits économiques "non traditionnels."
 29. La Cour européenne des droits de l'Homme a d'ailleurs senti le besoin de distinguer les droits économiques de la personne des dimensions économiques de la mise en œuvre de tous les droits humains. Dans l'Affaire *Airey* (1979) où il s'agissait de décider si le refus d'accorder l'aide juridique en matière de droit familial équivalait à un déni de la protection prévue par l'article 6 de la C.E.D.H., la Cour s'exprimait comme suit :

Para. 26 : La Cour n'ignore pas que le développement des droits économiques et sociaux dépend beaucoup de la situation des États, et notamment de leurs finances. D'un autre côté, la Convention doit se lire à la lumière des conditions de vie d'aujourd'hui et à l'intérieur de son champ d'application elle tend une protection réelle et concrète de l'individu. Or, si elle énonce pour l'essentiel des droits civils et politiques, nombre d'entre eux ont des prolongements d'ordre économique et

social. ... la Cour n'estime donc pas devoir écarter telle ou telle interprétation pour le simple motif que l'adopter risquerait d'empiéter sur la sphère des droits économiques et sociaux.

30. La théorie du droit international des droits de la personne a reconnu le besoin de prévoir, à l'échelle nationale, la disponibilité de recours utiles afin de garantir le respect de chaque droit de la personne appartenant soit au domaine de la *jus cogens*, ou pour lequel un État s'est lié par traité. Le Canada a ratifié les instruments de la *Charte* des droits de l'Homme, la Convention pour l'élimination de toutes les formes de violence faites aux femmes et la Convention des droits de l'enfant. Pour s'en tenir à cette seule liste d'instruments, reconnus comme fondamentaux, rappelons que la relation d'indivisibilité qui les lie mène à la conclusion que tous les aspects essentiels à la garantie de la sécurité humaine bénéficient des garanties issues des engagements internationaux du Canada.
31. Cependant, et au-delà des moyens prévus par le traité ou choisis par le Canada en vue de la mise en œuvre des droits protégés, les personnes doivent être en mesure d'accéder au système judiciaire dans le cas où l'un ou l'autre de leurs droits humains aurait été bafoué. A fortiori, *tous les droits humains* contribuant, du moins dans leur dimension essentielle ou minimale, à la sécurité humaine et toutes les atteintes à la sécurité humaine découlant des violations de ces droits doivent pouvoir faire l'objet d'un examen judiciaire.
 - Voir Observation générale no. 3 adoptée par le Comité d'experts du Pacte international relatif aux droits économiques, sociaux et culturels, 1990, *La nature des obligations des États Parties*, para. 5, Doc. NU HRI/Gen/1/Rev.5, 26 avril 2001, *Récapitulation des observations ou recommandations générales adoptées par les organes créés en vertu d'instruments internationaux relatifs aux droits de l'Homme*.
32. En conséquence, l'impossibilité de bénéficier de l'aide juridique en vue de rechercher devant les tribunaux la sanction d'une atteinte à sa sécurité à titre de violation d'un droit de la personne est susceptible de constituer une atteinte au principe de légalité, lequel repose entre autres sur le respect d'un ensemble de principes de justice fondamentale, dont le droit de bénéficier utilement d'un mécanisme de justice habilité à réparer le tort subi.
33. Cette atteinte est potentielle dans la mesure où toutes les violations de droits de la personne, y compris celles comportant une atteinte à la sécurité, ne nécessiteront pas nécessairement, aux fins de leur réparation, la saisine d'un tribunal. Des mécanismes de rechange (médiation, conseils, recours aux professionnels para-légaux) pourront utilement contribuer à la recherche de solutions appropriées. Toutefois, un recours systématique à ces mécanismes et prévu par la loi aux fins de les substituer à l'aide juridique peut aussi emporter des conséquences préjudicielles pour les groupes de la population

qui ne sont pas à même de défendre les enjeux de droit en cause ou qui, du fait de leur position vulnérable, ont peu à gagner de la résolution d'un conflit issu d'un rapport de force inégal.

34. Plusieurs éléments de la sécurité humaine comportent des enjeux de droits associés au droit social. Ce domaine du droit a des liens intimes avec la justice administrative où souvent, les citoyens peuvent en théorie se représenter eux-mêmes. Cette proposition, théorique, ne peut en elle-même disposer du besoin d'aide juridique aux fins de la sauvegarde des droits de la personne intimement associés aux garanties de sécurité humaine. La complexité des enjeux, tout comme les ressources souvent limitées des bénéficiaires exigent encore une fois un examen minutieux des principes de justice fondamentale en cause dans l'éventualité d'un refus ou d'une exclusion statutaire de l'accès à l'aide juridique à cette fin.
- Voir l'Observation générale no. 9 du Comité du Pacte international relatif aux droits économiques, sociaux et culturels, 1998, *Application du Pacte au niveau national*, Doc. NU E/C.12/1998/24.
35. Le Canada serait dans une position délicate s'il ne privilégiait pas une telle interprétation de ses engagements internationaux, ayant déjà reconnu que la protection du droit à la vie, garantie par l'article 6 du *Pacte relatif aux droits civils et politiques*, repose entre autres sur les interventions actives de l'État canadien en matière, par exemple, de protection sociale.
- Voir Observations finales du Comité des droits de l'Homme, Canada, 7 avril 1999, CCPR/C/79/Add.105, para. 12 et suiv.; en réponse à Quatrième Rapport périodique du Canada en vertu du *Pacte relatif aux droits civils et politiques*, CCPR/C/103/Add.5., mesures que le Canada met en œuvre en regard de la santé, à titre d'exemple;
 - William Schabas, "Freedom from Want : How Can we make Indivisibility more than a Mere Slogan" (2000) 11 *Droit constitutionnel* no. 2 189, 203.
36. Nous l'avons déjà dit, les modèles dominants d'aide juridique au Canada reposent sur le droit des citoyens d'être représentés devant les tribunaux dans le cas où leur sécurité est mise en péril par le fait des ingérences négatives ou abusives de l'État. Cette approche repose sur la dimension suspecte de l'État, compris comme une entité publique susceptible d'abuser de son pouvoir et de son autorité. Cependant, parler de la relation qui lie, dans les faits, les droits de la personne et la sécurité des personnes et des collectivités fait appel à un tout autre ensemble des fonctions de l'État. Il serait vain de nier les nombreux développements qui au cours du XX^e siècle ont fait de l'État un acteur central au chapitre de la sécurité humaine, entendu cette fois, comme un système de politiques publiques et de lois susceptibles de tenir la personne et sa famille à l'abri du besoin et de

contribuer à la réalisation de sa dignité. Sans égard au système politique concerné, ne s'agit-il pas en fait du modèle d'État proposé par la *Déclaration universelle des droits de l'Homme* : tantôt respectueux des libertés individuelles et tantôt responsable de la sauvegarde de la dignité humaine par ses interventions actives, destinées à répondre aux aspirations de justice sociale des populations concernées. Dans le contexte de la *Charte canadienne des droits et libertés*, il faut donc se demander comment intégrer cette dualité des rôles de l'État prévue par le droit international des droits de la personne dans la loi fondamentale du Canada en ce qui concerne le droit spécifique de bénéficier de l'aide juridique aux fins d'accéder à la justice.

- Martha Jackman, "Protection of Welfare rights under the *Charter*" (1988) 20 Ottawa L.R. 257.
37. Il doit être reconnu que l'État "social" canadien, *par ses actions et ses omissions*, pourrait s'ingérer activement, sinon abusivement, dans la vie privée des citoyens et des citoyennes au risque de porter atteinte à leur sécurité et à leur liberté. Il faut donc distinguer, dans cette proposition du concept d'ingérence étatique active, l'identification des besoins des citoyens et des citoyennes de celle des solutions proposées par l'État. Ainsi, par exemple, il y aura une ingérence de l'État équivalant à une violation du droit à la sécurité si en suspendant ou en modifiant le contenu ou le mode de livraison d'un programme gouvernemental, tel l'aide juridique, les citoyens se trouvent en conséquence mis en situation d'insécurité physique et psychologique. A cet égard, il conviendra tout autant d'envisager l'insécurité psychologique réelle qu'appréhendue. Il y aura aussi ingérence de l'État (par omission) lorsque ce dernier rend le contrôle administratif ou judiciaire improbable ou inaccessible aux citoyens.
38. En droit canadien, tout est à construire en ce qui concerne le droit constitutionnel de chaque personne à la sécurité prévu par l'article 7 de la *Charte canadienne*. Lorsque se présente le besoin d'interpréter la *Charte*, le recours au droit international et à son évolution est nécessaire. La Cour suprême en a d'ailleurs reconnu le besoin et l'utilité dans la mesure où il est de son devoir d'interpréter la loi fondamentale du Canada en conformité avec le droit international et les engagements du Canada sur la scène internationale.
- *Baker c. Canada (Ministère de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, para. 70;
 - *R. c. Ewanchuk*, [1999] 1 R.C.S. 330, para. 73;
 - *Slaight Communications c. Davidson*, [1989] 1 R.C.S. 1038, 1056;
 - Bruce Porter, "Judging Poverty : Using International Human Rights Law to Refine the Scope of Charter Rights" (2000) 15 *Journal of Law and Social Policy* 117, 145;

- Craig Scott, “Canada’s International Human Rights Obligations and Disadvantaged Members of Society : Finally in the Spotlight?” (1999) 10 : 4 Constitutional Forum 97;
- Nardia Bohler-Muller, “What the Equality courts Can Learn from Gilligan’s Ethic of Care : A Novel Approach” (2000) South African Journal of Human Rights 623.

La Cour suprême : le vide sur le concept de sécurité humaine

39. Notons d’abord que lorsqu’on le compare aux instruments internationaux ou régionaux de droits humains garantissant une protection équivalente, l’article 7 de la *Charte canadienne* présente des particularités. Ainsi, il se distingue de l’article 9(1) du *Pacte relatif aux droits civils et politiques* qui se lit comme suit :

Tout individu a droit à la liberté et à la sécurité de sa personne. Nul ne peut faire l’objet d’une arrestation ou d’une détention arbitraire. Nul ne peut être privé de sa liberté, si ce n’est pour des motifs, et conformément à la procédure prévus par la loi.

40. De même, il se distingue de l’article 5(1) de la *Convention européenne des droits de l’Homme* qui se lit comme suit :

Toute personne a droit à la liberté et à la sûreté. Nul ne peut être privé de sa liberté, sauf dans les cas suivants et selon les voies légales:
...

41. Contrairement à l’article 9(1) du Pacte et à l’article 5(1) de la C.E.D.H., l’article 7 de la *Charte canadienne* soumet les atteintes à la vie, à la liberté ET à la sécurité à l’exigence du respect des règles de justice fondamentale. C’est pourquoi il importe de dégager le contenu autonome du droit constitutionnel à la sécurité de sa personne. Cependant, la Cour suprême a jusqu’à ce jour été plutôt appelée à se pencher d’une part, sur les liens qui rendent dépendants l’un de l’autre le droit à la liberté et le respect des règles de justice fondamentale et d’autre part, sur le type d’atteintes susceptibles de constituer une violation du droit de chaque personne à la liberté, à titre de droit principal.

42. Dans un premier temps, la Cour suprême a jugé, sans pour autant en définir la portée, que le concept de justice fondamentale ne comporte pas strictement une dimension procédurale, comme en témoignent les articles 8 à 14 de la *Charte* qui protègent aussi les dimensions substantives issues des garanties judiciaires. Cette interprétation ne confère pas un statut autonome au concept de sécurité de la personne cependant.

- *Re B.C. Motor Vehicle Act*, [1985] 2 R.C.S. 486, 503.

43. Elle a ainsi décidé qu'une disposition législative de nature criminelle peut rendre si complexe et improbable l'exercice d'un choix individuel que cette disposition porte atteinte aux règles de justice fondamentale par sa nature clairement injuste, laquelle entraîne une atteinte à la sécurité physique et psychologique de la personne. Il est à noter que le concept de sécurité de la personne est en l'espèce appréhendé sous l'angle de la privation de l'exercice d'un libre choix susceptible d'engendrer une tension psychologique grave et issue de l'existence d'une règle de droit et de son application potentielle ou probable.
- *R. c. Morgentaler*, [1993] 3 R.C.S. 463, 456 (J. Dickson);
 - *R. c. O'Connor*, [1995] 4 R.C.S. 41;
 - *L.C. et P.G. Alberta c. Mills*, [1999] 3 R.C.S. 668.
44. En matière d'administration de la justice, ces atteintes, issues d'un manque de respect de règles de justice fondamentale, pourront même se produire dans un contexte autre que celui du droit criminel.
- *B.C. Human Rights Commission et al c. Blencoe*, [2000] 2 R.C.S. 307.
45. L'atteinte aux règles de justice fondamentale devra cependant découler d'une intervention de l'État via le système judiciaire et son administration.
- *R. c. Morgentaler*, [1993] 3 R.C.S. 463, para. 84;
 - *Renvoi relatif à l'article 193 et 195.1 (1)c du Code criminel*, [1990] 1 R.C.S. 1123, 1173-4;
 - *B.(R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, para. 88 (J. Laforest);
 - *J.G. c. Nouveau-Brunswick (Le ministre de la Santé et des Services communautaires)*, [1999] 3 R.C.S. 46 (J. Lamer, para. 58-66).
46. C'est donc d'abord à titre de conséquence d'une atteinte aux règles de justice fondamentale que s'est définie la notion de liberté et de sécurité de la personne (contra : *B.(R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, para. 87, J. Laforest). Mais c'est aussi principalement et premièrement sur les atteintes relatives à la liberté que la Cour suprême a préféré se pencher, lorsque cette atteinte est le fruit d'une intervention abusive de l'État équivalent à une atteinte aux règles de justice fondamentale, laquelle occasionne pour un individu une perte de contrôle sur son intégrité.
- *Renvoi relatif à l'article 193 et 195.1 (1)c du Code criminel*, [1990] 1 R.C.S. 1123, 1177-78 (J. Lamer);
 - *B.(R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, para. 22 (J. Lamer).

47. Dès qu'une règle de droit autre que criminelle est susceptible de violer le droit d'une personne à la sécurité, cette violation a été strictement définie par la Cour suprême à la lumière des exigences du respect du droit à la liberté. Par exemple, et ce malgré la légitimité des interventions étatiques en matière de protection de la jeunesse, la Cour suprême a préféré offrir aux parents la protection maximale de leur liberté de choix en matière d'éducation contre les interventions de l'État alors qualifiées d'abusives dès lors que l'intégrité familiale est menacée par l'éventualité d'une ordonnance judiciaire prévoyant le retrait du ou des enfants du domicile familial. La Cour assimile alors au préjudice grave découlant de l'application d'une règle criminelle abusive, du point de vue des principes de justice fondamentale, l'intervention de l'État susceptible d'entraîner un préjudice psychologique non moins grave.
- *J.G. c. Nouveau-Brunswick (Le ministre de la Santé et des Services communautaires)*, [1999] 3 R.C.S. 46 (J. Lamer, para. 59);
 - *B.(R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315 (J. Laforest, para. 83).
48. Selon la Cour suprême, l'ingérence abusive de l'État dont l'article 7 est destiné à assurer le contrôle ne peut se concevoir que dans des situations où est mise en cause l'individualité de la personne. C'est ce que M. le juge Bastarache a qualifié de "choix personnels fondamentaux" dans la décision *Blencoe*. Ainsi, et à titre d'exemples, l'avortement (*Morgentaler*), l'assistance au suicide (*Rodriguez*, [1993] 3 R.C.S. 319), l'éducation des enfants (*B.(R.) c. Children's Aid Society of Metropolitan Toronto*) et la protection des informations transmises dans le cours d'une thérapie destinée aux femmes victimes de violence (*O'Connor*) constituent de tels intérêts impérieux. Mais la vie moderne, tout comme les exigences du droit international des droits de la personne, exigent qu'afin de définir les intérêts impérieux de la personne, on tienne compte de l'incontournable déterminant que constitue son environnement social. On ne peut interrompre au seuil du domicile familial non plus que restreindre à la sphère des choix moraux la liste des déterminants susceptibles de porter atteinte aux choix fondamentaux du citoyen.
- *B.C. Human Rights Commission et al c. Blencoe*, [2000] 2 R.C.S. 307, para. 54 (J. Bastarache).
49. La prise en compte de ces déterminants sociaux permet aussi de distinguer les atteintes abusives de l'État à la liberté des individus et qui sont susceptibles de comporter en conséquence des menaces à sa sécurité de celles qui, même par suite d'une omission de l'État, portent directement atteinte à cette sécurité. Cette interprétation nous semble conforme à l'autonomie que confère au droit à la sécurité de la personne le texte même de l'article 7 de la *Charte canadienne* et aux prescriptions du droit

international des droits de la personne tout comme à d'autres développements du concept de sécurité humaine sur la scène internationale.

50. On doit accepter l'idée que l'insuffisance, l'absence ou la transformation d'un programme, d'une politique ou d'une loi destinée directement ou indirectement à la mise en œuvre de l'essentiel des droits nécessaires à la sécurité physique et psychologique de la personne peut constituer une atteinte aux règles de justice fondamentale en portant atteinte à la sécurité physique et psychologique des individus particulièrement vulnérables. L'évolution des programmes et législations en matière d'aide juridique révèle un tel souci au Canada. Comme pour toute autre loi ou intervention, l'État a cependant l'obligation de veiller à ce que les régimes d'aide juridique atteignent réellement leurs objectifs, en vue de la protection des dimensions les plus essentielles de chaque droit.
51. La Cour suprême n'a d'ailleurs pas écarté cette exigence malgré la reconnaissance du vaste champ discrétionnaire des législatures provinciales et territoriales dans la détermination de l'étendue des services d'aide juridique. Le Juge Laforest a précisé, dans la décision *B.(R.) c. Children's Aid Society of Metropolitan Toronto*, que ces garanties minimales ne peuvent se situer sous un seuil qui n'assure pas le respect des règles de justice fondamentale, tentant ainsi de conférer un contenu autonome au droit à la liberté et à celui à la sécurité de la personne garanti par l'article 7 de la *Charte canadienne*.
- *Prosper c. La Reine*, [1994] 3 R.C.S. 236, 267-68 (J. Lamer);
 - *B.(R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, para. 107.
52. Les services d'aide juridique ont été à tort associés à des mesures issues des politiques sociales. Comme le révèle une analyse sommaire des types de couverture d'aide juridique au Canada, plusieurs problématiques de nature différente sont susceptibles d'entraîner des litiges mettant en cause la sécurité physique et psychologique des citoyens et des citoyennes et les catégorisations fondées sur la seule histoire des politiques sociales au Canada serait hasardeuse. C'est plutôt la reconnaissance même de la vulnérabilité des citoyens privés des services de l'aide juridique par les législations pertinentes qu'il faut ici mettre en évidence. La retenue des tribunaux, lorsqu'il s'agit du respect de la marge de manœuvre des législatures en matière de politiques sociales doit donc en l'espèce être interprétée avec circonspection dans la mesure où toutes les violations de tous les droits humains sont susceptibles de porter atteinte à la sécurité des individus et nécessitent des mécanismes destinés à promouvoir l'accès à la justice. Il ne s'agit pas ici de débattre de la pertinence de l'intervention des tribunaux en matière de politiques sociales. C'est pourquoi il est nécessaire de distinguer les matières purement sociales des conséquences humaines

issues de la négation du droit à l'aide juridique. Ces conséquences peuvent survenir dans des contextes aussi divers que la protection de la jeunesse, le droit familial, le logement ou l'emploi. *Elles doivent au cas par cas faire l'objet d'un examen méticuleux.*

53. Il est illusoire et certainement inapproprié de s'en remettre d'abord aux tribunaux afin d'assurer que les divers régimes d'aide juridique ne contribuent pas à accroître l'insécurité des citoyens et des citoyennes en les privant de la possibilité d'accéder à la justice administrative ou de droit commun en matière autre que criminelle. À d'autres occasions, les décisions de la Cour suprême ont eu pour effet d'imposer la modification de législations afin de les rendre conformes à la *Charte canadienne*. Il convient donc de préciser comment une législation d'aide juridique au Canada, en ce qui concerne les dispositions relatives à la couverture des services, peut se conformer aux prescriptions de l'article 7 de la *Charte*, et ce dans le respect des engagements internationaux du Canada en matière de droits de la personne.

- *Vriend c. Alberta*, [1998] 1 R.C.S. 493.

Les exigences de l'article 7 de la *Charte canadienne* en matière d'aide juridique

54. La loi habilitante en matière d'aide juridique ne peut exclure automatiquement certaines catégories de services juridiques. Afin d'assurer la disponibilité de services juridiques dans le cas où un problème comporte une dimension juridique litigieuse et susceptible de porter atteinte à la sécurité physique et psychologique d'un individu ou d'une famille, la loi habilitante devra prévoir l'examen administratif de toutes les demandes d'aide juridique, indépendamment de la catégorie de services juridiques à laquelle cette demande a été historiquement associée.
55. Chaque décision relative à l'émission d'un mandat ou d'un certificat d'aide juridique devra pouvoir faire l'objet d'une révision administrative indépendante et la loi devra prévoir explicitement à titre de motif de révision la considération des atteintes à la sécurité physique et psychologique du demandeur et de sa famille et qui découlerait du refus d'accorder des services juridiques.
56. Dans la mesure où les services d'aide juridique sont requis à la sauvegarde de la dignité, de l'intégrité et de la sécurité du demandeur, une législation ou un régime d'aide juridique ne pourra limiter les services juridiques offerts en fonction des coûts d'administration du régime ou des dépassements des crédits annuellement octroyés.

57. La vulnérabilité particulière des clientèles habituellement éligibles aux services juridiques gratuits et leur appartenance fréquente à un groupe défavorisé, de même que la complexité des problèmes juridiques avec lesquels ces personnes sont souvent aux prises exige que la loi habilitante interdise aux gestionnaires du régime d'aide juridique de refuser un service juridique lorsqu'on estime que les coûts de l'affaire sont disproportionnés par rapport aux gains économiques escomptés ou que les chances de succès du recours ne sont pas assurés, sauf dans le cas d'une frivolité évidente.
58. Il est raisonnable et parfois souhaitable d'encourager ou d'exiger le recours à des ressources juridiques non contentieuses, telles la médiation, le conseil, l'arbitrage ou les plaintes administratives plutôt que d'émettre un certificat ou un mandat d'aide juridique. Cependant, plusieurs recherches tendent à démontrer que cette incitation ou cette obligation participe à la création d'un système de justice à rabais ou à deux vitesses, dans la mesure où seuls les plus démunis voient leurs problèmes juridiques déviés vers ces nouvelles solutions de rechange sans pour autant bénéficier de conseils juridiques ou d'une représentation susceptible d'équilibrer un rapport de force par ailleurs fort inégal.
59. Ainsi, un régime d'aide juridique qui tente de minimiser des coûts d'opération en prévoyant la possibilité de refuser les services juridiques dans l'éventualité où de tels services de rechange seraient disponibles devra assumer l'obligation de procéder à l'évaluation régulière de ces services afin d'éviter de perpétuer dans les faits l'insécurité et la privation chez les clientèles les plus vulnérables, du droit d'accéder à la justice.
60. En terminant, rappelons que les pratiques en matière d'aide juridique peuvent elles-mêmes porter atteinte au bon fonctionnement des systèmes d'aide juridique (délais, complexité administrative, qualité des services ...). Il n'est pas interdit de penser que certains de ces obstacles réels ou potentiels puissent aussi, dans les faits et selon les circonstances, porter atteinte à la sécurité physique et psychologique des demandeurs d'aide juridique. Il sera alors loisible aux tribunaux de dire si les particularités de l'administration de l'un ou l'autre des régimes d'aide juridique au Canada constituent de telles atteintes. Toutefois, rappelons que la *Charte canadienne* est la loi fondamentale du Canada, loi à laquelle sont soumises toutes les autres législations. Nous avons donc tenté de préciser quelles sont les exigences "universelles" de la *Charte* en matière d'aide juridique dans les domaines autres que le droit criminel.

Is There a Constitutionally-Protected Right to Legal Aid in Canada?

Margaret McCallum*

OVERVIEW

Part I of this memo provides summary statements of my arguments and conclusions, and the succeeding Parts provide fuller statements with supporting authorities. I do not deal with the issue of whether the lack of legal aid in Canada conflicts with Canada's international commitments to human rights. Reluctantly, I conclude that recent cases on the right to counsel do not support an argument that the poor have a constitutional right to legal aid. In 1993, the *Charter* Committee on Poverty Issues (CCPI) came to the same conclusion, and decided to focus on particularly compelling cases where state action was threatening *Charter* rights.¹ The CCPI intervened in *R. v. Prosper*, in which Justice McLachlin, as she then was, stated that “[t]he poor are not constitutional castaways.”² Despite this statement, and despite some encouraging developments recently, I fear there is a very frayed rope maintaining the connection between the poor and access to justice in Canada.

1. **Although there is a constitutional right at common law to access to the courts, there is no general right to legal aid to permit indigent individuals to avail themselves of this right.**

Canadian courts recognize that access to the courts is “a cornerstone of our rights in a democratic society,”³ but have yet to recognize a constitutionally-protected

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¹ Charter Committee on Poverty Issues (CCPI), “Report to the Members,” October 17th and 18th, 1993, p.18, reporting on research done by Jayne Kapek of the Public Interest Law Centre in Manitoba. The CCPI litigation website is <http://www.net/ccpi/cases>.

² *R. v. Prosper*, [1994] S.C.J. No. 72 at para. 102.

³ Justice MacAdam in *Pleau v. Nova Scotia (Supreme Court, Prothonotary)*, [1998] N.S.J. No. 526 (N.S. Sup. Ct. -- Chambers) at para. 110. See also *British Columbia Government Employees Union v. British Columbia (Attorney-*

right to state-funded counsel to ensure that indigent individuals will have legal representation in criminal, civil or administrative proceedings. Nor have courts yet recognized a right to state-funded counsel to permit an individual to argue that their *Charter* rights have been violated. Recent lower court decisions, however, suggest that judges may be willing to require the Crown to pay for counsel for individuals who are raising valid constitutional questions that affect them directly and will have substantial and wide-ranging implications for others.⁴

2. Judges have the obligation to act on a case-by-case basis to ensure that lack of representation will not violate the requirements for a fair trial under section 7 and section 11 of the *Charter*.

In some circumstances, where the state has commenced proceedings that may result in depriving an individual of liberty or security of the person, and where legal representation is necessary to ensure that such deprivation is in accordance with the principles of fundamental justice, as guaranteed by section 7 of the *Charter*, the court may, under section 24 of the *Charter*, order a stay of the proceedings until the government provides the individual with state-funded counsel. In some circumstances, where a stay of proceedings would not protect the individual from a violation of section 7 *Charter* rights, as, for example, where the proceeding at issue is a bail hearing, or where the stay of proceedings would not be in the best interests of a child, as, for example, in a hearing to determine whether provincial child welfare authorities should be granted custody of a child, the court may order the appropriate government authority to provide funding for legal representation for the individual whose liberty or security of the person is threatened. Where representation is necessary to ensure compliance with *Charter* guarantees of procedural fairness, the state is not under a positive obligation to provide representation, although it cannot proceed unless representation is provided.

3. All Canadian legal aid programmes exclude some matters from legal aid coverage and impose financial eligibility requirements for obtaining legal aid. These provisions are open to *Charter* review, whether they are contained in legislation or result from decisions of the legal aid

General), [1988] 2 S.C.R. 214 at 228-230, relied on by MacAdam, a decision upholding the power of a superior court judge to issue an *ex parte* injunction against picketing of court houses by members of a union engaged in a lawful strike.

⁴ See the decisions of Provincial Court judges in N.S. and N.B. in *R. v. Dedam*, [2001] N.B.J. No. 186 and *R. v. McDonald*, [2001] N.S.J. No. 148, staying proceedings under federal fisheries legislation until the Crown provided state-funded counsel to permit the accused to present a defence based on aboriginal and treaty rights. See also *Spracklin v. Kichton*, [2001] A.J. No. 990 (Alta. Q.B.), Watson, J., ordered the Crown to provide funding for a constitutional challenge to a definition of spouse in family property legislation that excluded those who were not legally married. Watson, J., at para. 77, emphasized that the order was not being made as a *Charter* remedy, but described it, at para. 80, as an order “comparable to an interim order for costs against Alberta, but [which] might perhaps be characterized as an order requiring Alberta to provide counsel for [the applicant] in relation to her need for representation” for the constitutional challenge. It was significant for the court that the constitutional challenge was not frivolous and had a good chance of succeeding.

authorities which have been delegated the power to determine eligibility for legal aid.⁵ Nonetheless, the denial of legal aid to many indigent applicants is not easily characterized as a violation of the right to equality before and under the law and the right to the equal protection and benefit of the law as guaranteed in section 15 of the *Charter*.

The *Charter* is concerned with state action, and in section 15 specifically, with state action that involves discrimination on the grounds listed in section 15 or grounds analogous to those listed in section 15. Legal aid programmes exist to mitigate some of the disadvantages faced by the poor in obtaining access to the benefits of the law. The financial and subject matter requirements for eligibility are not likely to be viewed as discrimination, but as distinctions based on legitimate criteria relevant to the purposes of the programme. Nor, despite the requirements of section 36 of the *Charter*, or of Canada's international commitments to fundamental human rights, are courts likely to find any constitutional requirement for positive action to ameliorate social or economic inequality through legal aid funding.

4. The most effective arguments in support of better funding for legal aid may be pragmatic political arguments, rather than legal arguments.

There are significant costs for the government in determining the extent of the right to state-funded counsel on a case-by-case basis. The federal and provincial departments of justice and legal aid agencies spend time and money responding to applications for a stay of proceedings or an order for state-funded counsel, or arguing against appeals of decisions on the basis that the appellant was unrepresented at trial. Court time, too, is taken up with applications for orders for a stay of proceedings or for state-funded counsel, and, when judges do not always give similar weight to similar facts in making these determinations, counsel cannot be faulted for bringing applications which are ultimately unsuccessful. These observations do not provide a legal argument for a constitutionally-protected right to legal aid in Canada, but they raise concerns about whether the limited resources currently available for legal representation for the indigent are allocated effectively.

RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS

Section 10(b) Right of Detainees to Obtain Counsel Without Delay

⁵ See *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 at 645-646, 662, 664-666.

The Supreme Court of Canada in *Brydges* held that police must inform those detained or arrested of their right to speak to a lawyer, and of the existence and availability of duty counsel and legal aid. In reaching this conclusion, Justice Lamer made statements suggesting that all detainees have the right to immediate advice from state-funded duty counsel, and that indigent detainees have the right to legal aid to obtain counsel.⁶ The Supreme Court in *Prosper*, however, rejected the argument that the right to consult counsel without delay created a constitutional obligation on the provincial and territorial governments to make duty counsel available free of charge round the clock, while noting that lack of duty counsel might lead to the exclusion of evidence, including the results of a breathalyzer test.⁷ The court based its conclusion on Parliament's rejection of a proposed addition to what became section 10 of the *Charter* providing for state-funded counsel where a person had insufficient means to pay for counsel and representation was necessary in the interests of justice.⁸ *Prosper* thus creates a significant barrier to arguing for a general right to state-funded counsel even in the criminal law context.

R. v. Rowbotham

R. v. Rowbotham is commonly cited as authority for the right of the accused to have state-funded counsel if necessary to ensure a fair trial. The Ontario Court of Appeal, in a unanimous decision, held that the *Charter* does not “constitutionalize the right of an indigent accused to be provided with funded counsel. . . . However, in cases not falling within provincial legal aid plans, sections 7 and 11(d) of the *Charter* . . . require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial.”⁹ A court has the power and the obligation, both at common law and under the *Charter*, to ensure that an accused person obtains a fair trial. Where legal aid has been refused, and the accused cannot afford counsel, the trial judge must determine whether representation of the accused is essential to a fair trial, and if it is, the trial judge must stay the proceedings until counsel or funding for counsel is provided, either by the Crown or the provincial legal aid plan. The Court of Appeal acknowledged that the decision of the legal aid authorities regarding the accused's financial means “is entitled to the greatest respect.” Nonetheless, there may be “rare circumstances” in which, because of the length and complexity of the proceedings or for other reasons, the accused cannot afford to retain counsel to the extent necessary to ensure a fair trial. The court noted that in former times, counsel who volunteered or were appointed by the court to

⁶ [1990] 1 S.C.R. 190 at 215.

⁷ *R. v. Prosper*, [1994] 3 S.C.R. 236 (S.C.C.). The court limited the statements about the right to counsel in *Brydges* to the facts of that case, which arose in a jurisdiction which had both legal aid and a duty counsel service, citing Justice Lamer's statement in *Brydges* at 217 that the court was not deciding whether the accused had a constitutional right to representation.

⁸ *Ibid.*, paras. 30, 69.

⁹ *R. v. Rowbotham*, [1988] O.J. No. 271 at 35.

defend indigent accused often did so without remuneration, but regarded this practice as neither feasible nor fair, given the increased length and complexity of modern trials, and the increase in lawyers' overhead costs.

Applying *Rowbotham*

The jurisprudence that has developed since *R. v. Rowbotham* provides a straightforward statement of the questions relevant to the determination of when an accused need representation to ensure that proceedings are conducted in accordance with the principles of fundamental justice. First, the applicant must establish, on a balance of probabilities,¹⁰ his or her inability to obtain a lawyer privately or with legal aid funding. Secondly, the accused must establish that the proceedings are both serious and complex, and thirdly, that he or she lacks the capacities to effectively represent him or herself.¹¹ In addition, the judge should consider whether the disadvantages of the lack of counsel can be overcome with assistance from the bench, in fulfillment of the judge's obligation to ensure a fair trial.¹²

Accused's Ability to Pay for Counsel

On the question of the accused's financial resources, courts generally require evidence that the accused has applied to legal aid and pursued the application through existing appeal procedures, and that the accused is not unreasonably

¹⁰ *R. v. Magda*, [2001] O.J. No. 1861 (Ont. Sup. Ct. of Justice) para. 26.

¹¹ Note that the court in *Rowbotham* expressly limited its ruling to the situation of an accused charged with a serious offence who lacks the means to employ a lawyer, leaving for another day the question of whether a person charged with less serious offences has the right to counsel. For examples of cases where the court ordered a stay of proceedings until the accused was provided with funded counsel, see *R. v. Lewis*, [1995] Y.J. No. 116 (Yukon Territorial Court) (multiple charges including narcotics and firearms offences); *R. v. Hill*, [1996] O.J. No. 677 (Ont. Ct. of Justice, Prov. Div.) (charge of operating a motor vehicle with a blood alcohol level of over 80 mgs); *R. v. Zylstra*, [1996] O.J. No. 1157 (Ont. Ct. of Justice, Gen. Div.) (charge of sexual assault); *R. v. Gauvin*, [1997] N.B.J. No. 5 (N.B. Q.B.) (charge of conspiracy to traffic in cocaine); *R. v. Baba*, [1998] B.C.J. No. 3141 (B.C. S.C.) (charge of robbery); *R. v. Wabush* (2000), 191 Sask. R. 69 (Sask. Q.B.) (application to have accused declared a dangerous offender); *R. v. Anderson*, [2000] N.S.J. No. 87 (N. S. Prov. Ct.) (charges of unlawful confinement and assault); *R. v. Sbrolla*, [2001] O.J. No. 1585 (Ont. Sup. Ct. of Justice) (42 charges of fraud against five individuals and two corporations); *R. v. Magda*, [2001] O.J. No. 1861 (Ont. Sup. Ct. of Justice) (11 charges relating to theft against two individuals); *R. v. MacDonald*, [2001] N.S.J. No. 148 (N.S. Prov. Ct.) and *R. v. Dedam*, [2001] N.B.J. No. 186 (N.B. Prov. Ct.) (charges of obstructing fishery officer in execution of duties). For examples of cases where the court ruled that the accused could have a fair trial without legal representation, see *R. v. Rain*, [1998] A.J. No. 1059 (Alta. C.A., leave to appeal denied) (charges of driving while impaired and failing to comply with demand for breath sample); *United States of America v. Akrami*, [2001] B.C.J. No. 174 (B.C. S.C.) (application for funded counsel for extradition proceedings); *R. v. Satov*, [1996] O.J. No. 2500 (Ont. Ct. of Justice, Prov. Div.) (charge of common assault).

¹² *R. v. Keating*, [1997] N.S.J. No. 250 (N.S. C.A.); *R. v. Rain*, [1998] A.J. No. 1059 at paras. 36-41.

rejecting what legal aid has offered.¹³ Courts also expect clear and detailed evidence of the accused's financial circumstances, supported by income tax returns or other documentation, and evidence of the accused's efforts to secure funds through liquidating assets, obtaining additional employment or borrowing money.¹⁴ Judges hearing matters under the *Young Offenders Act* should inquire regarding the parents' resources in determining whether to make an order directing appointment of counsel for the young person pursuant to section 11 of the *Young Offenders Act*.¹⁵

Seriousness and Complexity of the Proceedings

There is a wide range of matters which judges regard as serious enough that an accused needs representation to ensure a fair trial.¹⁶ Generally, courts will not consider a matter serious unless incarceration is a likely, and not merely a possible, consequence of conviction.¹⁷ Nonetheless, judges recognize that "the issue of incarceration is significant but not determinative of the issue. . . . To decide otherwise would be to conclude that whenever an accused was not facing jail, a court could never rule that the fairness of the trial was affected should the trial proceed without counsel."¹⁸ Judges are usually willing to hold that representation is necessary to ensure a fair trial where there are multiple charges, multiple accused, challenges to the admissibility of evidence, defences requiring expert testimony, and *Charter* arguments. In these circumstances, judges may also stay the proceedings until the government or legal aid authorities agree to fund counsel for more time or at higher hourly rates than those ordinarily authorized by the legal aid plan.¹⁹

Accused's Capacity to Represent Self

¹³ *R. v. Mercer*, [2001] N.J. No. 3 (Nfld. Sup. Ct. –T.D.); *R. v. Mianskum*, [2000] O.J. No. 5240 (Ont. Sup. Ct. of Justice).

¹⁴ *United States of America v. Akrami*, [2001] B.C.J. No. 174 (B.C. Sup. Ct.); *R. v. Drury*, [2000] M.J. No. 457 (Man. C.A.); *R. v. Keating*, [1997] N.S.J. No. 250 (N.S. C.A.).

¹⁵ *R. v. J.H.*, indexed as *R. v. M.(B)* (1999), 180 D.L.R. (4th) 297 (Ont. C.A.); the appeal court did not discuss the contrary decision in *R. v. T.W.P.*, [1996] O.J. No. 2668 (Ont. Ct. of Justice, Prov. Div.), relied on by the judge at trial.

¹⁶ See the cases cited *supra*.

¹⁷ *R. v. Baba*, [1998] B.C.J. No. 3141 (B.C. Sup. Ct.); *R. v. Rain*, [1998] A.J. No. 1059 (Alta. C.A.); *R. v. Baig* (1990), 58 C.C.C. (3d) 156 (B.C. C.A.), leave to appeal denied; *Mireau v. Canada* (1991), 96 Sask. R. 197 (Sask. Q.B.).

¹⁸ *R. v. Hill*, [1996] O.J. No. 677 (Ont. Ct. of Justice, Prov. Div.) following *R. v. Powell* (1984), 9 C.R.R. 54 (Alta. Prov. Ct.) and the decision of the trial judge in *R. v. Rain*, subsequently overturned on appeal.

¹⁹ *R. v. Magda*, [2001] O.J. No. 1861 (Ont. Sup. Ct. of Justice); *R. v. Dedam*, [2001] N.B.J. No. 186 (N.B. Prov. Ct.); *R. v. MacDonald*, [2001] N.S.J. No. 148 (N.S. Prov. Ct.); *R. v. Sbrolla*, [2001] O.J. No. 1585 (Ont. Sup. Ct. of Justice); *R. v. Chan*, [2000] A.J. No. 1225 (Alta. Q.B.); *R. v. Gauvin*, [1997] N.B.J. No. 5 (N.B. Q.B.).

In assessing the accused's capacity to represent him or herself, judges consider whether the accused can understand what is necessary to respond to the Crown's case, including whether the accused can effectively cross-examine witnesses, and whether the accused will be able to present his or her evidence and argument. The accused's level of education and articulateness are treated as important factors in this assessment.²⁰

Power of the Court to Order Stay of Proceedings or to Order that the Crown Provide Funded Counsel

Given the comments of Justice Lamer in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, as discussed below, it seems clear that courts have the power to order the Crown to pay for counsel where representation is necessary to ensure that an accused person receives a fair trial. Nonetheless, some judges are willing to order a stay of proceedings under section 24(1) of *Charter* but not to make an order compelling the government to spend money.²¹ Other judges are willing to make either order, under the *Charter* or under their inherent jurisdiction at common law to ensure a fair trial.²²

RIGHT TO COUNSEL IN CIVIL PROCEEDINGS WHICH IMPLICATE SECTION 7 CHARTER RIGHTS

Child Welfare Proceedings

Since the decision of the Supreme Court of Canada in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*,²³ indigent parents may be entitled to state-funded counsel to respond to an application by child welfare authorities for an order abrogating either temporarily or permanently the parents' right to custody of the child, either following the ruling in *N.B v. G.(J.)* or based on the court's *parens patriae* jurisdiction.²⁴

²⁰ *R. v. Bailey*, [2001] N.S.J. No. 272 (N.S. C.A.); *R. v. Rain*, [1998] A.J. No. 1059 (Alta. C.A.).

²¹ *R. v. Anderson*, [2000] N.S.J. No. 87 (N.S. Prov. Ct.); *R. v. Gawin*, [1997] N.B.J. No. 5 (N.B. Q.B.); *Canada (A.G.) v. Savard*, [1996] Y.J. No. 4 (Yukon Territorial C.A.); *R. v. Zylstra*, [1996] O.J. No. 1157 (Ont. Ct. G.D.); *R. v. Lewis*, [1995] Y.J. No. 116 (Yukon Territorial Court).

²² See *R. v. D.P.F.*, [2000] N.J. No. 110 (Nfld. Sup. Ct. – T.D.), in which Justice Rowe stated explicitly that he was not deciding the case under the *Charter*, but under the judge's common law duty to ensure that a trial is conducted in a manner that is in the interests of justice.

²³ [1999] S.C.J. No. 47.

²⁴ See *F.B. v. S.G.*, [2001] O.J. No. 1586 (Ont. Sup. Ct. of Justice) in which Himel, J., allowed the mother's appeal against an order making her child a ward of the Crown, on the basis that the mother had not been represented at the hearing. As the mother herself was a minor, the judge, pursuant to section 38 of the *Child and Family Services Act*, ordered the Children's Lawyer to represent her if she did not obtain counsel. In *I.N. v. Newfoundland (Legal Aid Commission)* [2000] N.J. No. 312 (Nfld. Sup. Ct. -- Unified Family Ct.), the court ordered state-funded counsel for the parent, relying on the *parens patriae* jurisdiction. For examples of cases in which applicants were denied state-funded counsel, see *J.W. v. M.E.S.* [2000] B.C.J. No. 985 (B.C. Supreme Ct.) in which Meiklem, J.,

New Brunswick (Minister of Health and Community Services) v. G.(J.)

Justice Lamer, writing for the majority in *N.B. v. G.(J.)*, held that there is no right to state-funded counsel unless “government action triggers a hearing in which the interests protected by section 7 of the Canadian *Charter of Rights and Freedoms* are engaged” and unless representation is necessary to ensure a fair hearing.²⁵

Although Justice Lamer expressly refrained from commenting on the correctness of the lower court decisions on the right to counsel in the criminal law context, he adopted the criteria set out in those cases for determining whether legal representation is necessary to ensure a fair hearing: the seriousness of the interests at stake, the complexity of proceedings, and the capacities of the applicant for self-representation.²⁶ Once applicants establish the first two criteria, the need for state-funded counsel follows, as “an unrepresented parent will ordinarily need to possess superior intelligence or education, communication skills, composure and familiarity with the legal system in order to effectively present his or her case.”²⁷

Justice Lamer held that the section 7 interest at stake in child protection proceedings is the right to security of the person; he expressly declined to address either the section 7 liberty interest or any section 15 right to counsel.²⁸ Justice Lamer also held that it is rare that a denial of the right to a fair hearing could be justified under section 1 of *Charter*; the objective of limiting legal aid expenditure is not sufficient justification given the importance of the section 7 right.²⁹ Where representation is necessary to ensure a fair trial, the court has the power to order the government to provide counsel. Thus, although there is “no blanket right” to state-funded counsel under section 10, there may be circumstances where “the requirements of a fair hearing” obligate governments to pay for counsel.³⁰

dismissed the mother’s application for an order that the Crown pay her counsel for preparation time beyond that permitted by the legal aid programme, as the applicant had not met the evidentiary burden of establishing that the legal aid allowance was inadequate; *Children’s Aid Society of London and Middlesex v. T.C.*, [1999] O.J. No. 5506 (Ontario Sup. Ct. of Justice), in which Marshman, J. refused to order state-funded counsel for a mother in an application by the state to terminate a previous supervision order, the effect of which would be to leave the children in the custody of their maternal grandparents.

²⁵ Para. 2. Justices Gonthier, Cory, McLachlin, Major and Binnie concurred with the Chief Justice, without writing separate reasons for decision. Justice L’Heureux-Dube, writing for herself and Justices Gonthier and McLachlin, concurred in separate reasons which dealt with some issues expressly omitted from the Chief Justice’s reasons. For a detailed comment on this case, see Patricia Hughes, “En Route to More Equitable Access to the Legal System?” (2000) 15 *Journal of Law and Social Policy* 93-116.

²⁶ Paras. 75, 86, 90.

²⁷ Para. 80. In determining the capacities of the parent, Justice L’Heureux-Dube, at para. 123, warned against requiring the parent to denigrate his or her skills, holding that the focus of the inquiry should be on the parent’s education level, linguistic abilities, facility in communicating, age and similar indicators not determinative of the child custody matter.

²⁸ Paras. 55, 56.

²⁹ Paras. 99, 100.

³⁰ Para. 107, in which Justice Lamer reconciles the decision in *New Brunswick (Minister of Health and Community Services) v. G.(J.)* with the Supreme Court’s earlier decision in *Prosper*, discussed above.

Security of the Person

Like all *Charter* rights, the section 7 right to security of the person provides assurance that state interference with that security will be in accordance with the principles of fundamental justice. Although not limited to criminal or penal proceedings, section 7 is concerned with restrictions on liberty and security of the person “that occur as a result of the individual’s interaction with the justice system and its administration. . . . the subject matter of section 7 is the state’s conduct in the course of enforcing and securing compliance with the law.”³¹

Here, the state action is the initiation of child welfare proceedings; the state, acting in the best interests of the child, has the right to remove the child from the custody of its parents, but only if the state acts in accordance with the principles of fundamental justice, that is, after a fair hearing before a neutral and impartial arbiter.³² Child welfare proceedings attract the protection of section 7 because they directly interfere with the parent’s security of the person. In previous decisions, the Supreme Court has recognized that security of the person includes psychological as well as physical integrity. Justice Lamer held that the loss of privacy and disruption of family life that results from subjecting the parent-child relationship to state inspection and review, the loss of companionship of the child, and the stigmatization as an unfit parent, constitute a serious and profound interference with psychological integrity.³³ Other state actions that interfere with a parent-child relationship, such as incarceration as a result of a criminal conviction, or conscription into the army, are not interferences with section 7 rights to security of the person, because the state is not usurping the parental role, prying into the intimacies of the parent-child relationship, or making pronouncements about the parent’s fitness.³⁴

Liberty

Justice L’Heureux-Dubé, in a judgment concurred in by Justices Gonthier and McLachlin, held that child welfare proceedings threatened both liberty and security of the person as guaranteed under section 7. In coming to this conclusion, she relied on Justice La Forest’s ruling in *B.(R.)* that parental-decision making and other attributes of custody are protected under the liberty interest. Bastarache, J., writing a dissenting opinion in *N.B. v. G.(J.)* in the N.B. C.A., also regarded child welfare proceedings as implicating the right to liberty.³⁵

³¹ Para. 65.

³² Paras. 69-72.

³³ Paras. 60, 61, 62.

³⁴ Paras. 63, 64.

³⁵ Paras. 115, 117, 118; *B.(R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] S.C.R. 315.

Applying *N.B. v. G.(J.)*

The content of the right to liberty and security of the person as articulated in *N.B. v. G.(J.)* and in previous decisions of the Supreme Court, particularly that of Justice Wilson in *Morgentaler*, includes the right to make personal decisions of fundamental importance free from state-induced psychological stress.³⁶ Denial of state-funded legal aid, or uncertainty as to whether an applicant will qualify for legal aid, is state-induced psychological stress that may violate the *Charter*.

Custody Disputes Between Parents

When one parent engages the other in litigation over child custody, the proceedings are likely to result in loss of privacy, disruption of family life, and interference with the liberty and psychological security of the parent just as much as would child protection proceedings. Yet courts will not order state-funded counsel to ensure a fair trial in custody disputes between parents, because, as it is not the state that is creating the psychological stress, section 7 rights are not implicated.³⁷

Other Civil Actions

Similarly, no matter how stressful it is to be involved in litigation, and no matter how serious the matter for the parties involved, there are no indications yet that courts will find any right to state-funded counsel to protect section 7 rights where the state is not a party to the action.³⁸

Administrative Proceedings

Proceedings in which the state compels the appearance of an individual before an administrative tribunal offer the most promise for extending the ruling in *N.B. v. G.(J.)*, providing the state action creates a significant threat to liberty or security of the person, the interest at stake in the proceeding is serious, the matter complex, and the individual unable to present his or her case adequately without the assistance of counsel. Proceedings that seem to meet these criteria include expropriation proceedings, applications to evict tenants from public housing, appeals against termination of social welfare benefits, proceedings to revoke a

³⁶ *R. v. Morgentaler*, [1988] 1 S.C.R. 30 per Wilson, J. at 164-167, 173-174 and per Dickson, C.J. at 54-57.

³⁷ *Mills v. Hardy* (2000), 13 R.F.L. (5th) 150 (N.S. C.A.), leave to appeal denied; *Ryan v. Ryan*, [2000] N.S.J. No. 13 (N.S. C.A.); *Miltenberger v. Braaten*, [2000] S.J. No. 599 (Sask. Q.B. -- Family Division); but note *S. H. v. W.H.*, [1999] N.J. No. 152 (Nfld. Sup. Ct. -- Unified Family Ct.), decided prior to the Supreme Court's decision in *N.B. v. G.(J.)*, in which Cook, J., ordered the Minister of Justice "to appoint an *amicus curiae*" for a child whose parents were contesting each other's claim to custody in proceedings under the *Divorce Act*. Cook, J., made the order under the *parens patriae* jurisdiction and pursuant to Rule 16 of the Rules of the Unified Family Court, which authorize the court to provide for representation of a minor or a person of unsound mind.

³⁸ *Sanderson v. Sasknative Rentals Inc.*, [1999] S.J. No. 178 (Sask. Q.B.) decided prior to *N.B. v. G.(J.)*; *Hall v. Remai*, [2000] S.J. No. 504, Sask. Q.B.) affirming *Sanderson* without reference to *N.B. v. G.(J.)*.

license to carry on the occupation by which a person earns a livelihood, applications for involuntary committal of the mentally ill, disciplinary hearings in federal or provincial institutions,³⁹ applications for parole,⁴⁰ and immigration inquiries that might lead to deportation, especially where there is cogent evidence that his or her life or liberty is in danger in the home state.⁴¹

EXPANDING THE RIGHT TO LEGAL AID: ARGUING THAT CURRENT LEGAL AID PROGRAMMES VIOLATE SECTION 15 EQUALITY RIGHTS

Given the limits of the case-by-case approach to obtaining legal aid, and the judicial rejection of any general right to state-funded counsel, some advocates have attempted to use section 15 of the *Charter* to obtain more government funding for legal aid. To establish an infringement of section 15(1), applicants must show that they are not receiving equal treatment before or under the law or that the law has a differential impact on them in terms of the protection and benefit accorded by law, and that the difference in treatment or impact is discrimination on grounds enumerated in section 15 of the *Charter* or on analogous grounds. Proof of discrimination requires proof that the applicant faces burdens, obligations or disadvantages because of a distinction based on personal characteristics of the individual or group that are immutable, like race, or changeable only at unacceptable cost to personal identity, like language, religion, or sexual orientation.⁴² The denial of legal aid funding for many kinds of legal proceedings could be held to be a discriminatory denial of the equality guaranteed by section 15 on three grounds: a) poverty; b) sex; c) province of residence.

Poverty

Poor people are disadvantaged in pursuing legal remedies because they lack the financial resources to hire lawyers to represent them. Poor people may also be

³⁹ See *Winters v. Legal Services Society* (1999), 137 C.C.C. (3d) 371 (S.C.C.).

⁴⁰ *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75.

⁴¹ An applicant for funded legal aid for an immigration inquiry should be able to distinguish the decision in *A.B. v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 14, in which the Federal Court of Appeal denied an application for an order that the federal government provide funding for counsel for preparation time beyond the limit set by the provincial legal aid plan. Without deciding whether there was a right to state-funded counsel in the circumstances, the court ruled that the federal government had no constitutional obligation to provide legal aid to an individual for a matter covered under the provincial legal aid plan when it already contributed to the provincial plan. The provincial government had not been made a party to the application.

⁴² *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *R. v. Swain*, [1991] 1 S.C.R. 933 at 992; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at 529; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at 216.

disadvantaged because, given the social and cultural constraints of living in poverty, they may have limited knowledge of legal rights or feel less entitled to assert them.⁴³ Poverty is not an enumerated ground in section 15, but there is judicial authority at the level of a provincial court of appeal for considering poverty as an analogous ground.⁴⁴ Recognizing poverty as an analogous ground would conform with the values of self-respect and self-worth that the Supreme Court has said are to be protected by section 15,⁴⁵ and the poor present the characteristics that the Supreme Court looks for in identifying analogous grounds: they are “lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked.”⁴⁶ However, because the poor are a “disparate and heterogeneous group,” rather than a “discrete and insular minority,”⁴⁷ judges have been unwilling to find that poverty is an analogous ground, or that the indigent should not be required to pay court fees.⁴⁸

Even if poverty were accepted as an analogous ground, it is hard to characterize restrictions on eligibility for legal aid based on the matter applied for, or the income of the applicant, as restrictions based on irrelevant personal characteristics of the accused.⁴⁹ Legal aid is a benefit not available to all members of society, but all applicants are treated in the same way. Where the government has created a programme to ameliorate some of the disadvantages of living in poverty,

⁴³ Ian Morrison and Janet Mosher, “Barriers to Access to Civil Justice for Disadvantaged Groups” in Ontario Law Reform Commission, *Rethinking Civil Justice: Research Studies for the Civil Justice Review*, vol. 2 (Toronto, 1996) at 650-663; Janet Mosher, “Poverty Law -- A Case Study” in Ontario Legal Aid Review, *A Blueprint for Publicly Funded Legal Services: Report of the Ontario Legal Aid Review*, vol. 3 (Toronto, 1997) 913-957 at 914-918, 924-925.

⁴⁴ *R. v. Rehberg*, [1994] N.S.J. No. 35 (N.S. C.A.) paras. 83-87 (finding that the man-in-the-house rule disqualifying women from eligibility for welfare benefits is a denial of section 15 equality rights); *Dartmouth/Halifax County Regional Housing Authority v. Sparks*, [1993] N.S.J. No. 97 (N.S. C.A.) (finding that the exemption of tenants in public housing from the security of tenure provisions in provincial residential tenancies legislation is a denial of section 15 equality rights).

⁴⁵ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at 530.

⁴⁶ *Corbiere v. Canada*, [1999] 2 S.C.R. 203 at 252, per L’Heureux-Dube, Gonthier, Iacobucci and Binnie, JJ..

⁴⁷ *Masse v. Ontario (Ministry of Community and Social Services)* (1996), 143 D.L.R. (4th) 20; leave to appeal to the Ont. C.A. and the S.C.C. denied.

⁴⁸ *Polewsky v. Home Hardware Stores Ltd.*, [1999] O.J. No. 4151 (Ont. Sup. Ct. of Justice) holding that the fees necessary to initiate or defend actions in Small Claims Court did not violate section 15 rights to access to the courts. In making this ruling, Gillese, J., over-ruled *Polewsky v. Bank of Montreal*, [1999] O.J. No. 2606 (Ontario Ct. of Justice G.D. -- St. Thomas Small Claims Court), ordering the court clerk to waive payment of the prescribed fees. The decision of Misener, J., in *Polewsky v. Home Hardware Stores*, [2000] O.J. No. 81 (Ont. Sup. Ct. of Justice), granting Polewsky leave to appeal, offers some hope that Gillese J.’s ruling may be overturned. Note that in *Pleau v. Nova Scotia (Supreme Court, Prothonotary)*, [1998] N.S.J. No. 526 (N.S. Sup. Ct. -- Chambers), MacAdam, J., rejected a section 15 challenge to hearing or appearance fees for court time, struck down the fees as unconstitutional at common law because they denied or hindered access to the courts.

⁴⁹ *Mireau v. Canada* (1991), 96 Sask. R. 197 at 207, denying an application for state-funded counsel to pursue a remedy for numerous alleged *Charter* violations rights.

decisions about eligibility do not create distinctions which result in discrimination unless the eligibility criteria are unrelated to the purposes of the programme.⁵⁰

The decision of the Supreme Court in *Eldridge* may provide a way out of this analytical impasse. In a rare unanimous decision, the court declared that a provincial government's failure to provide funding for sign language interpreters for deaf people as necessary to permit them to receive medical services was a violation of their section 15 rights.⁵¹ Even though the state had no constitutional obligation to provide medical services, once it did so, it had to ensure that deaf people received the same level of medical care as the hearing population. This obligation existed even though the disadvantage faced by the deaf was not a result of government action. To rule otherwise would permit governments to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits -- a view of section 15 that Justice La Forest described as "thin and impoverished."⁵² This obligation to take positive action to extend the scope of a benefit to previously excluded classes of persons should apply as well to compel the government to make legal aid available so that the poor can access the courts and enforce rights and remedies provided by law.

Sex

Legal aid programmes vary considerably among the thirteen provincial and territorial jurisdictions in Canada, with respect to financial eligibility requirements, matters covered, funds available to the programme, and modes of service delivery, but preliminary empirical research suggests that in all of the programmes, significantly more legal aid funding goes to male applicants than to female applicants. The imbalance exists because legal aid is generally available for criminal but not civil matters, and men more than women face criminal charges.⁵³ Facially neutral provisions are nonetheless discriminatory if they impact adversely on a group included under an enumerated or analogous ground.⁵⁴ Thus, although the legal aid programmes do not explicitly deny legal aid coverage to women, they may be held to violate women's equality if there is

⁵⁰ *Masse v. Ontario (Ministry of Community and Social Services)* (1996), 143 D.L.R. (4th) 20; leave to appeal to the Ont. C.A. and the S.C.C. denied.

⁵¹ *Eldridge v. British Columbia (Attorney-General)*, [1997] 3 S.C.R. 624.

⁵² *Eldridge v. British Columbia (Attorney-General)*, [1997] 3 S.C.R. 624 at 677-678.

⁵³ M. J. Mossman, "Gender, Equality, Family Law and Access to Justice," (1994) 8 *International Journal of Law and the Family* 357-373; LEAF-NB, *Access to Justice in New Brunswick: The Adverse Impact of Domestic Legal Aid on Women* (Fredericton, 1996); Report of the Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993).

⁵⁴ *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Eldridge v. British Columbia (Attorney-General)*, [1997] 3 S.C.R. 624 at 670-675.

sufficient empirical evidence that they significantly disadvantage women as compared to men.⁵⁵

In *N.B. v. G.(J.)*, Justice L’Heureux-Dubé held that the denial of legal aid for parents in child protection proceedings was a denial of the equality guaranteed by section 15 of the *Charter*, because women, and especially single mothers, are “disproportionately and particularly affected” by these proceedings. Justice L’Heureux-Dubé also noted the likelihood that these parents would be members of other disadvantaged and vulnerable groups, particularly visible minorities. Thus, in determining how to protect section 7 rights, and the principles of fundamental justice, courts must “take into account the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of these disadvantaged individuals and groups whose protection is at the heart of section 15.”⁵⁶

These comments suggest the possibility for expanding legal aid coverage beyond the confines of state action where necessary to ensure that women are able to benefit equally with men in accessing the legal remedies provided them. The arguments for state-funded legal aid to ensure equal access to the law are particularly compelling for women who want to leave an intimate relationship but need legal aid to obtain support payments and property entitlements for themselves and their children, as being shut out of the courts in these circumstances may well involve risks to security of the person and liberty.⁵⁷ Arguments on positive obligations based on the *Eldridge* decision apply with even more force to the disadvantage faced by women as compared with men in accessing legal aid and the equal benefit and protection of the law.

Province of Residence

The federal government contributes to funding for criminal legal aid through federal/provincial cost-sharing agreements which specify some standards for minimum legal aid coverage, although provinces differ in what coverage is provided above the minimum. Federal funding for non-criminal legal aid comes from the Canada Health and Social Transfer (C.H.S.T.), which is not subject to standards for minimum coverage. The difference in coverage of legal aid

⁵⁵ Patricia Hughes, “Domestic Legal Aid: A Claim to Equality” (1995) 2 *Review of Constitutional Studies* 203-220. More empirical research is necessary to substantiate this claim. See M. J. Mossman, “Gender Equality and legal aid services: a research agenda for institutional change” (1993) 15 *Sydney Law Review* 30-58.

⁵⁶ Paras. 113, 114.

⁵⁷ See Nathalie Des Rosiers, “The Legal and Constitutional Requirements for Legal Aid” in *Ontario Legal Aid Review, A Blueprint for Publicly Funded Legal Services: Report of the Ontario Legal Aid Review*, vol. 2 (Toronto, 1997) 503-542. At 535, she states: “courts have begun to be sensitive to the criticism of an “unequal” *Charter* interpretation; I suggest that such a trend will continue. . . . In my view, the courts will be sensitive to the equality argument and will want to broaden the scope of section 7 to prevent accusations that section 7 and the *Charter* generally protect only the rich or only men. . . . I suggest that the criticisms with respect to the unequal distribution of legal aid resources will emerge as challenges under section 7.”

programmes across the country means that individuals living in different parts of the country have differential access to legal aid, and thus are denied equal access to the benefits and protections of the law. Legal aid provision is a provincial, not a federal matter, so it is difficult to argue that differences between jurisdictions violate the equality provisions of section 15. However, the lack of national standards for federally-funded programmes, including social programmes funded through the C.H.S.T., may violate section 15 equality rights, and particularly the right to the equal benefit of section 36 of the *Constitution Act, 1982*, which states the commitment of the federal and provincial governments to promoting, *inter alia*, equal opportunities for the well-being of Canadians, and to providing essential public services of reasonable quality to all Canadians. This argument, however, is likely to be more efficacious in lobbying rather than in litigation, especially if supported with references to the poor reports Canada has been getting recently from international human rights monitoring agencies.⁵⁸

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⁵⁸ For discussion of some of the possibilities of these arguments, and their intersection with Canada's international commitments to human rights, see A. Nader, "Providing Essential Services: Canada's Constitutional Commitment Under section 36" (1996) 19 *Dalhousie Law Journal* 306-372; M. Jackman, "From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees Through *Charter of Rights Review*" (1999) 14 *Journal of Law and Social Policy* 69-90; B. Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of *Charter Rights*" (2000) 15 *Journal of Law and Social Policy* 117-162.

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A Constitutional Right to Civil Legal Aid in Canada?

Mary Jane Mossman* with Cindy L. Baldassi**

INTRODUCTION: THE CONTEXT OF LEGAL AID SERVICES

In the end the debate over the role of government subsidy of legal aid is in some sense a debate over the role of law and lawyers in modern society.¹

... Legal aid should form part of the administration of justice in its broadest sense. It is no longer a charity but a right.²

Legal aid for indigent Canadians has been a matter of continuing debate for several decades, in the context of the enactment of provincial statutory schemes for the provision of legal aid services and significant contributions of funds by the federal government. Specific legal aid issues, including coverage, delivery systems, cost-effectiveness, and governance have been approached in somewhat different ways across the country.³ In general, however, provincial schemes have tended to provide legal aid services more often for accused persons charged with criminal law offences than for indigent litigants in civil law matters.⁴ Yet, in spite of the provision of legal aid for criminal law matters, “right to counsel” cases in Canada, as in the United States, have tended to be initiated by accused persons

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¹ Marshall J. Breger, “Legal Aid for the Poor: A Conceptual Analysis” (1982) 60 North Carolina Law Review 282 at 360.

² Ontario Ministry of the Attorney General, *Report of the Joint Committee on Legal Aid* (Toronto: Ministry of the Attorney General, 1965) at 97.

³ For a recent overview, see Ontario Legal Aid Review, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (Toronto: Ontario Legal Aid Review, 1997) at 9-51.

⁴ For an overview, see M.J. Mossman, “Toward a Comprehensive Legal Aid Program in Canada: Exploring the Issues” (1993) 4 Windsor Review of Legal & Social Issues 1. For an insightful analysis of the impact of poverty and disadvantage in the criminal justice system, see National Council of Welfare, *Justice and the Poor* (Ottawa: Ministry of Public Works and Government Services, 2000).

who were denied legal aid rather than by claimants in civil law matters; even prior to the enactment of the *Canadian Charter of Rights and Freedoms*, such “right to counsel” challenges often relied on the *Canadian Bill of Rights* to support the claim that state-funded counsel was necessary to ensure a fair trial.⁵

With the enactment of the *Canadian Charter of Rights and Freedoms*, legal challenges concerning an accused’s need for state-funded counsel have continued to be presented, often without much success.⁶ Nonetheless, in the context of a long and complex trial in *R. v. Rowbotham*, the Ontario Court of Appeal held that sections 11(d) and 7 of the *Charter*, guaranteeing an accused a fair trial in accordance with the principles of fundamental justice, might require the appointment of state-funded counsel for an indigent accused if representation was requested and was essential to a fair trial.⁷ Yet, in reaching this conclusion, the court merely ordered a re-assessment of the accused’s ability to pay for counsel in accordance with the needs of the defence; there was no direct order for state-funded counsel. Consistent with this restrained approach to the “right to counsel” issue, the Supreme Court of Canada held in *R. v. Prosper* that section 10(b) of the *Charter* (providing that an accused has a right to retain counsel) did not impose a substantive constitutional obligation on governments to ensure that duty counsel was available to provide free legal advice to an accused person at the time of arrest or detention.⁸

⁵ For example, see *Re White and the Queen* (1976), 1 Alta. L.R. 292 (Alta. S.C.); *Re Ewing and Kearney and the Queen* (1974), 49 D.L.R. (3rd) 619 (B.C.C.A.). In these cases, courts identified principles for determining whether state-funded counsel was necessary to ensure a fair trial; for example, see *Re White and the Queen*, above, at 306. In the United States, see *Powell v. Alabama* 287 U.S. 45 (1932); *Gideon v. Wainwright* 372 U.S. 335 (1963); and *Argersinger v. Hamlin* 407 U.S. 25 (1972). For an overview of American cases in relation to the right to counsel, see Mossman, “The *Charter* and the Right to Legal Aid” (1985) 1 *Journal of Law and Social Policy* 21, at 32 ff.

⁶ In a number of cases, courts refused to order state-funded counsel, asserting that there is no unqualified constitutional right as a matter of fundamental justice to provision of state-funded counsel at trial or on appeal: see *R. v. Robinson* (1989), 51 C.C.C. (3d) 452 (Alta. C.A.); *Re Baig and the Queen* (1990), 58 C.C.C. (3d) 156 (B.C. C.A.); *R. v. Rockwood*, [1989] 91 N.S.R. (2d) 305 (N.S. C.A.); and *Deutsch v. Law Society Legal Aid Fund* (1985), 11 O.A.C. 30 (Ont. C.A.).

⁷ (1988) 41 C.C.C. (3d) 1. In *Rowbotham*, the accused lacked the means to employ counsel to conduct a 12-month trial, although she had some funds available to pay for a defence. The court noted that legal aid might provide counsel for her for only parts of the trial, as needed. Such applications are characterized as “*Rowbotham* applications:” for a recent example, see *R. v. Magda*, [2001] O.J. No. 1861. The Alberta Court of Appeal provided a list of criteria for consideration in a *Rowbotham* application in *R. v. Rain* (1994), 157 A.R. 385, at 390. For an overview of concerns about unrepresented litigants in criminal cases, see Alan N. Young “Legal Aid and Criminal Justice in Ontario” in *Ontario Legal Aid Review*, above note 3, 629 at 643 ff.

⁸ [1994] 3 S.C.R. 236. In reaching this conclusion, the court relied on the transcript of debates of the Joint Committee at the time of the adoption of the *Charter*, as well as concern about the court’s interference with governmental allocation of (scarce) resources. In relation to the right to counsel in criminal law matters, see also *R. v. Brydges*, [1990] 1 S.C.R. 190, where the court held that there is a duty on police officers, at the time of arrest or detention of an accused, to inform the accused of a right to counsel and the availability of duty counsel and legal aid.

In this context, the decision of the Supreme Court of Canada in *New Brunswick (Minister of Health and Community Services) v. G.(J.)* in 1999,⁹ determining that state-funded counsel was necessary to ensure a fair trial in child protection proceedings, has provided new impetus to ideas about a constitutional entitlement to legal services. In its analysis of the interest of “security of the person” and the “principles of fundamental justice” pursuant to section 7, the court in *G.(J.)* appears to have adopted a more proactive approach to the “right to counsel;” as Peter Hogg commented, “the court [in *G.(J.)*] seems to have repented of its restrained attitude and moved forcefully into the review of legal aid plans.”¹⁰ Accordingly, the “positive constitutional obligation” set out in *G.(J.)* is potentially applicable to many criminal law matters, and to “every civil case or administrative proceeding in which the categories of life, liberty or security of the person are involved.”¹¹ *G.(J.)* also provides some commentary on the “liberty” interest in section 7 and the equality guarantees in section 15.

Thus, an analysis of arguments to support a constitutional right to legal aid services in civil law matters in Canada now begins with the reasoning of *New Brunswick (Minister of Health and Community Services) v. G.(J.)*. This paper provides an overview of the *G.(J.)* decision, and then examines in more detail the arguments which support a constitutional right to civil legal aid under section 7 (“liberty” and “security of the person”) and pursuant to section 15 (“equality before and under the law, equal protection and equal benefit of the law”). In doing so, the paper briefly addresses the relationship between civil and criminal law matters in the context of the right to counsel, the use of protections in international covenants, and the importance of considering clients’ needs for different kinds of legal aid services. The paper makes suggestions in relation to a number of areas of civil law for which these arguments are relevant, including family law matters beyond child protection hearings.

NEW BRUNSWICK (MINISTER OF HEALTH AND COMMUNITY SERVICES) V. G.(J.)

A right to legal aid “in some circumstances”

In *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, the Supreme Court of Canada unanimously concluded that the trial judge should have ordered the provision of state-funded counsel for J.G. in a hearing initiated by the

⁹ [1999] 3 S.C.R. 46. References to this decision are indicated in square brackets in the text.

¹⁰ Peter Hogg, *Constitutional Law of Canada* looseleaf, 4th ed. (Scarborough: Carswell, 1997) at section 47(4)(k).

¹¹ According to Hogg, *ibid.*, “there is now a very broad basis for the judicial review on constitutional grounds of denials of legal aid, and every province will have to examine the design, funding and staffing of its provincial legal aid plan to see if it meets the new standard.” For an argument that there is a right to counsel in cases other than those involving imprisonment, if counsel is essential to a fair trial, see Young, above note 7.

Minister pursuant to New Brunswick's child protection legislation, the *Family Services Act*. The Minister had initiated proceedings for an extension of an order for custody, initially granted for a period of six months, in relation to J.G.'s three children. J.G., who was in receipt of welfare, was unable to afford legal representation for the hearing, and there was no provision at that time for legal aid services for such proceedings in New Brunswick.¹² The trial judge decided that state-funded counsel was not necessary to ensure a fair trial in the child protection hearing,¹³ and the New Brunswick Court of Appeal (Bastarache and Ryan JJ. dissenting) upheld the decision of the trial judge. The Supreme Court of Canada allowed J.G.'s appeal, unanimously concluding that the trial judge should have ordered provision of state-funded counsel "in the circumstances of this case" [para. 75]. The court unanimously held that state-initiated child protection proceedings had potential to deprive the mother and her children of "security of the person" pursuant to section 7 of the *Canadian Charter of Rights and Freedoms*; that in the absence of legal representation for J.G. in this case, the proceedings did not satisfy the "principles of fundamental justice;" and that the infringement of section 7 could not be justified pursuant to section 1 of the *Charter*.

There were two judgments in the Supreme Court of Canada:

- the majority judgment of Chief Justice Lamer (with which Gonthier, Cory, McLachlin, Major and Binnie JJ. concurred); and
- a concurring judgment of Justice L'Heureux-Dubé (with which Gonthier and McLachlin JJ. concurred).

Interpreting the *Charter* in *G.(J.)*

¹²

According to Rollie Thompson, "every legal aid plan in Canada gives top priority on the civil side to representation of parents in protection proceedings" so that, outside of New Brunswick, the effect of *G.(J.)* will be modest. All the same, as Thompson suggested, the decision "will serve as a significant bulwark for protection cases against any future cuts to legal aid funding and services:" see Thompson "Annotation" (1999) 50 R.F.L. (4th) 74.

¹³

Although Madam Justice Athey dismissed J.G.'s motion for the appointment of state-funded counsel, her decision revealed concerns about the absence of legal representation in such proceedings. Referring to *Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.)*, [1994] 2 S.C.R. 165, she noted the "collision" between the rights of parents to bring up their children without state interference and the need for courts to ensure the children's well-being; and acknowledged how often parents in child protection proceedings face the challenges of "poverty, single parenthood, economic and social disadvantage and limited education...." She also identified a recommendation in a report of the New Brunswick Department of Justice which suggested that individuals should have "fair and equal access to the justice system" regardless of economic means, and stated "In my view this policy statement is not being adhered to in situations such as this where the family, the very fabric of our society, is in jeopardy of being torn apart after state intervention." Athey J. also ordered payment by the Minister of Justice of the "reasonable fees and disbursements" of J.G.'s counsel in relation to the motion for state-funded counsel for J.G.: (1995) 131 D.L.R. (4th) 273, at 283-284.

The majority judgment

The Supreme Court of Canada *unanimously* concluded that the Minister's application for an extension of the custody order threatened to deprive the mother of "security of the person," pursuant to section 7 of the *Charter*. While state interference with parental custody could be justified to protect a child's health and safety, the proceedings had to meet the requirement of "the principles of fundamental justice" in section 7. A fair procedure included the mother's effective participation:

Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby threatening to violate both the appellant's and her children's section 7 right to security of the person [para. 81].

The decision also concluded that the infringement of section 7 was not saved by section 1 of the *Charter*: a parent's right to a fair hearing when the state seeks to suspend parental custody of children outweighs the additional costs to a legal aid programme of providing legal services, considered in the light of the government's entire budget [para. 100; and application of the *Oakes* test at para. 98].¹⁴

The concurring judgment

According to the concurring judgment, the child protection proceedings invoked not only "security of the person" but also the "liberty" interest in section 7, because the proceedings might deprive a parent of the ability to make decisions on behalf of her children and guide their upbringing [para. 118]. The concurring judgment also held that the interpretation of protected interests under section 7 of the *Charter* must take account of the equality values of sections 15 and 28 of the *Charter*. Since issues of fairness in child protection hearings also have significance for women and men who are members of disadvantaged and vulnerable groups, the analysis of section 7 rights must take account of "the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of section 15" [para. 115].

The test formulated in *G.(J.)*

The majority judgment concluded that a fair hearing "*in the unusual circumstances of this case*" [para. 83] required that J.G. be represented by

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R. v. Oakes, [1986] 1 S.C.R. 103. The court adopted the formulation of Iacobucci J. in *Egan v. Canada*, [1995] 2 S.C.R. 513 that there must be 1) a legislative objective which is pressing and substantial; and 2) a means chosen to attain the legislative end which is reasonable and demonstrably justifiable in a free and democratic society (thus requiring rational connection, minimal impairment, and proportionality) [*G.(J.)* para. 95].

counsel, having regard to 1) the seriousness of the interests at stake; 2) the complexity of the proceedings; and 3) the capacities of the appellant [para. 75]. While agreeing with the test formulated in the majority judgment, the concurring judgment suggested a need to view these interests broadly:

I would view these interests broadly, and would therefore find that the right to funded counsel in child protection hearings, when a parent cannot afford a lawyer and the parent is not covered by the legal aid scheme, will not infrequently be invoked.... Funded counsel must be ordered whenever a fair hearing will not take place without representation.... The trial judge's duty to ensure a fair trial may therefore, when necessary, involve an order that the parent be provided with legal counsel, and trial judges should not, in my view, consider the issue from the starting point that counsel will be necessary to ensure a fair hearing only in rare cases [paras. 120 and 125].

The majority judgment in *G.(J.)* identified a responsibility on the part of a trial judge to ensure a fair trial, if necessary by the appointment of state-funded counsel [paras. 103 and 104]. The concurring judgment indicated agreement with the majority reasoning “that it is the obligation of the trial judge to exercise his or her discretion in determining when a lack of counsel will interfere with the ability of the parent to present his or her case....” [para. 119]. An assessment of the need for representation to achieve fairness “must take into account the important value of meaningful participation” [para. 125].

SECTION 7: “SECURITY OF THE PERSON”

The reasoning in *G.(J.)*

According to the majority judgment, the right to “security of the person” protects “both the physical and psychological integrity of the individual” [para. 58]. An attempt by the state to remove children from their parents’ care, whether temporarily or permanently, “... constitutes a serious interference with the psychological integrity of the parent” [para. 61], encompassed by section 7's protection for “security of the person;” Lamer, C.J. acknowledged that determining exactly what impacts psychological integrity is not simple [para. 59]. The impugned state action “must have a serious and profound effect on a person’s psychological integrity” and the effects of the interference must be assessed objectively, “with a view to their impact on the psychological integrity of a person of reasonable sensibility” (greater than ordinary stress or anxiety, but not to the level of nervous shock or psychiatric illness) [para. 60].

The majority judgment concluded that “state removal of a child from parental custody pursuant to the state’s *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent” [para. 61], identifying as elements of the infringement of security of the person: “the loss of companionship of the child,” the “gross intrusion [of the state] into a private and

intimate sphere,” and the serious consequences of being stigmatized as an “unfit” parent: “as an individual’s status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state’s conduct” [para. 61].

The majority judgment also acknowledged that the right to security of the person extends beyond the criminal law context;¹⁵ thus, for example, the court indicated that confinement to a mental institution by the state would infringe both liberty and security of the person [para. 65]. However, to constitute an infringement of “security of the person” in a case like *G.(J.)*, the state must directly interfere with the psychological integrity of the parent *qua* parent [paras 63 and 64].¹⁶

The scope for applying *G.(J.)* to civil cases

Child protection proceedings

In *Winnipeg Child and Family Services v. K.L.W.*,¹⁷ the Supreme Court of Canada unanimously concluded that section 21(1) of Manitoba’s child protection legislation, providing for the apprehension of a child from parental care, contemplated an infringement of “security of the person” and thus could be implemented only in accordance with the principles of fundamental justice. Although there was disagreement about whether the legislation met the requirements of fundamental justice, the court was unanimous in concluding that state apprehension of a child may cause emotional and psychological distress for

¹⁵ The majority judgment relied upon *Mills v. The Queen*, [1986] 1 S.C.R. 863, where the court held, in relation to the section 11(b) right to be tried within a reasonable time, that the combination of stigmatization, loss of privacy, and disruption of family life constituted a restriction on security of the person pursuant to the *Charter*. According to the court, “... security of the person is not restricted to physical integrity; rather, it encompasses protection against ‘overlong subjection to the vexations and vicissitudes of a pending criminal accusation’... These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction” [para. 62].

¹⁶ For the majority, “a child custody application is an example of state action which directly engages the justice system and its administration. The *Family Services Act* provides that a judicial hearing must be held in order to determine whether a parent should be relieved of custody of his or her child” [para. 66]. The court distinguished cases where actions did not meet this test, including *Augustus v. Gosset*, [1996] 3 S.C.R. 268.

¹⁷ [2000] 2 S.C.R. 519. Prior to *G.(J.)*, the court examined section 7 in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; a majority of the court held that the prohibition in section 241(b) of the *Criminal Code* (prohibiting assisted suicide) deprived Rodriguez of her autonomy and caused her physical pain and psychological stress in a manner which impinged on “security of the person.” In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, three of five majority judges found that the abortion provisions in the *Criminal Code* constituted an infringement of security of the person not just in the risk to health caused by the legal restrictions on access to abortions, but also in the loss of control for women in terminating a pregnancy. According to Hogg, this approach suggests that security of the person includes a requirement of personal autonomy: Hogg, above note 10, at section 44.8. *G.(J.)* has now been cited in a number of lower court decisions in relation to claims about “security of the person.”

parents and constitutes a serious intrusion into the family sphere.¹⁸ Thus, it seems that the Supreme Court is unanimous that a parent's interest in "security of the person" is engaged in child protection proceedings; however, the real challenge for determining the need for state-funded counsel is whether the proceedings meet the test of the principles of fundamental justice in section 7.¹⁹

Other proceedings affecting parents

In addition to child protection proceedings, Nick Bala has identified a number of other areas of family law decision-making which may engage the "security of the person" interest for parents, thus requiring hearings which meet the requirements of "fundamental justice":²⁰ long-term foster parents with significant parent-child relationships;²¹ adoption proceedings, especially where the spouse of one parent seeks to adopt a child, thus severing relations with the other biological parent;²² and proceedings that raise issues of paternity.²³ In all of these cases, it is arguable that the state interferes with the psychological integrity of the parent *qua* parent; thus, whether the parent is biological or social, it is arguable that significant parent-child relationships are within the protection of section 7 and "security of the person."

Child protection proceedings: children

Similarly, Bala argued that the decision in *G.(J.)* may now require fair processes in relation to children, since the court recognized that children have their own

¹⁸ In this case, the court did not consider whether there was also an infringement of the right to liberty in section 7.

¹⁹ Prior to *G.(J.)*, in *Children's Aid Society of Ottawa-Carleton v. T.(M.)*, [1995] O.J. No. 3879, the court held that a decision in child protection proceedings to refuse an adjournment to permit the mother to obtain counsel rendered the trial ineffectual. The "principles of fundamental justice" are discussed later in this paper.

²⁰ Nicholas Bala "The *Charter of Rights* & Family Law in Canada: A New Era" (2000) 18 Canadian Family Law Quarterly 373, at 419-422, and cases cited therein. Bala provides a useful comparison between Canadian decisions and a number of those in the United States. Thompson, above note 12, also provides an overview of family law and other civil matters which may now require the provision of state-funded counsel as a result of *G.(J.)*. Interestingly, he also suggested that *G.(J.)* "opens up to constitutional litigation the non-provision of a wide range of government benefits and services" because the denial is by the state and may have a "serious and profound effect on a person's psychological integrity:" the denial or termination of social assistance, eviction from public housing, disconnection of monopoly electric or gas service, refusal of necessary medical or hospital services, and denial of legal aid services. As Thompson concluded, "for poverty lawyers, *G.(J.)* is now the starting point for arguments about procedural - and substantive - fundamental justice." See above note 12, at 77- 78.

²¹ See also *P.(N.P.) v. Alberta (Regional Children's Guardian)* (1988), 14 R.F.L. (3d) 55 (Alta. Q.B.).

²² In *N.(I.) v. Newfoundland (Legal Aid Commission)*, [2000] Doc No 88/0079, the court directed state-funded counsel for an indigent biological mother in an application to challenge the validity of an order for the adoption of her children by foster parents with whom they had been placed. In making the order for state-funded counsel, the court used its *parens patriae* jurisdiction, rather than section 7 of the *Charter*.

²³ Bala, above note 20, at 422 suggested that it may now be argued that reasonable efforts have to be made to locate a father before an adoption is complete, and that an indigent litigant should have the right to have the state pay for blood tests to determine paternity.

constitutional right to “liberty and security of the person;” thus, there may be cases where children should have the right to their own independent, state-funded counsel in protection proceedings.²⁴ Some provisions of the *Convention on the Rights of the Child* also confirm a child’s right to be heard in judicial or administrative proceedings “either directly, or through a representative;”²⁵ although the *Convention* does not include a provision for state-funded counsel, the right to participate in proceedings may engage the fairness test in relation to the principles of fundamental justice.²⁶

Family law disputes

Whether the *Charter* applies to family law disputes more generally is a complex issue. Although the court decided early on that the *Charter* applies only to government action,²⁷ the application of this principle has proved difficult in practice. A number of arguments have been suggested. First, Bala argued that the Supreme Court’s decision in *Young v. Young*²⁸ shows that it would not permit the *Charter* to be used in a dispute between parents in a way that is contrary to the best interests of the child. As a result, he suggested that “in a parental custody dispute, an indigent parent may have a constitutional claim to state paid counsel to protect ‘security of the person,’ especially if the other parent has a lawyer.”²⁹ In decisions both before and after *G.(J.)*, courts have assessed claims for state-funded counsel in divorce proceedings; however, perhaps because section 7 requires the court to determine not only whether there has been an infringement of “security of the person” but also whether the proceedings fail to accord with the “principles of fundamental justice,” there have been few orders for state-funded counsel.³⁰

²⁴ For one example, see *Children’s Aid Society of Winnipeg (City) v. M.(R.A.)* (1983), 37 R.F.L. (2d) 113; and the discussion in Bala, above note 20, at 415. Bala also suggested that sibling access might be another situation in which a child’s section 7 interest might be engaged.

²⁵ See *Convention on the Rights of the Child* (Ottawa: Minister of Supply and Services, 1991), at Article 9 (re child protection proceedings) and Article 12 (in relation to other legal proceedings).

²⁶ For a case where the court considered Article 9 of the *Convention*, but concluded that the absence of state-funded counsel for the children would not render the trial unfair, see *P.W.S. v. British Columbia (Director of Child, Family and Community Services)*, [2000] B.C.J. No 2656 (British Columbia Supreme Court). The children were all less than three years old.

²⁷ *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

²⁸ [1993] 4 S.C.R. 3; and see discussion in Bala, above note 20, at 423.

²⁹ Bala, above note 20, at 423-424.

³⁰ Prior to *G.(J.)*, a court ordered the legal aid programme in Ontario to provide counsel for a mother in a contested custody dispute with the child’s father on the basis that the case affected the best interests of the child: *G.M.S. v. K.S.S.* (1996), 20 O.T.C. 396. In *Fowler v. Fowler* (1997), 32 R.F.L. (4th) 426, the court refused to follow *G.M.S.*; in *Fowler*, the applicant had been denied legal aid. There have been a number of other decisions after *G.(J.)*, where courts have refused to order state-funded counsel in divorce proceedings. In *Ryan v. Ryan* (2000), 181 N.S.R. (2d) 255 (C.A.), the court refused to appoint counsel for an indigent spouse in a divorce matter, although, as Bala noted, the issues were mainly economic. However, in *Miltenberger v. Braaten*, [2000] S.J. No. 599, the court refused to appoint state-funded counsel for a mother who was involved in a protracted

In addition to cases concerned with the best interests of the child, Bala suggested that a claim for state-funded counsel will be stronger “if there are allegations of physical or sexual violence against a spouse” or allegations of child abuse,³¹ since both of these situations may engage the section 7 interest in “security of the person.” According to Brenda Cossman and Carol Rogerson, the need for counsel provided by the state is greater in cases of abuse and violence in family proceedings because the failure to provide representation may permit continuation of the abuse and violence.³² According to Bala, moreover, such a claim will be stronger if one parent is receiving legal aid because “state support for one parent should be sufficient to entitle the other indigent parent to claim that there is state involvement creating a *Charter* right to representation.”³³

As well as these arguments, David Dyzenhaus has argued that “security of the person” may be affected by a disparity of power, and that it should be taken into account, whether the disparity occurs because of state action or as a result of private action.³⁴ This approach to disparate legal resources between men and women in family law matters would also engage the section 7 interest and the need for state-funded counsel in cases where the disparity precludes a fair trial. Beyond cases of children’s best interests and situations of abuse and violence, Dyzenhaus’ formulation of the basis for invoking section 7 broadens the test to include any forms of disparity of power.

Other civil law matters

Using the formulation in *G.(J.)* that an infringement of “security of the person” occurs when state action has a serious and profound impact on the psychological integrity of a person, it is arguable that there are other civil law contexts in which constitutional claims to state-funded counsel could be established. Although writing prior to *G.(J.)*, Nathalie Des Rosiers suggested a number of legal contexts in which there would be an infringement of “liberty and security of the person:”

custody dispute; unfortunately, in this case, the mother had failed to prove her indigence. Similarly, in *S.A.K. v. A.C.* [2001] A.J. No 999, the Alberta Court of Appeal refused to order state-funded counsel to a father in a custody dispute; the facts indicated that the legal aid programme had already provided nine lawyers, all of whom were regarded as unsatisfactory by the father.

³¹ Bala, above note 20, at 425.

³² Brenda Cossman and Carol Rogerson, “Case Study on the Provision of Legal Aid: Family Law” in *Ontario Legal Aid Review*, above note 3, 773 at 819 and 823. In *R. v. Mills*, [1999] 3 S.C.R. 668, the court seemed, according to Bala, to provide some constitutional recognition to claims by women and children who are victims of abuse and violence. See Bala, above note 20, at footnote 142.

³³ Bala, above note 20, at 425. Bala also argued that “security of the person” may curtail the access “rights” of grandparents in relation to parental decision-making about their children. Cossman and Rogerson also suggest that where the state forces social benefits applicants to pursue private actions for support in order to establish eligibility for benefits, there is state action even though the opposing party in the litigation is not the state. Cossman and Rogerson, above note 32, at 788.

³⁴ Dyzenhaus, “Normative Justifications for the Provision of Legal Aid” in *Ontario Legal Aid Review*, above note 3, at 475. These arguments are considered in more detail below.

proceedings involving committal or non-consensual administration of treatment in mental health law; deportation and probably also refugee status hearings in immigration law; disciplinary actions and parole board hearings for prisoners, child protection and adoption proceedings in family law, witnesses “forced to testify or to disclose documents,” self-incrimination, and some criminal appeals.³⁵ Indeed, the formulation of the test in *G.(J.)*, “state action which has a serious impact on the psychological integrity of a person,” appears to be potentially quite broad in application.³⁶

However, in its recent decision in *Blencoe v. British Columbia (Human Rights Commission)*,³⁷ the Supreme Court of Canada rejected claims by a respondent to a human rights complaint that his section 7 rights to liberty and security of the person were infringed.³⁸ In relation to the interest in “security of the person,” the majority judgment analyzed the nature of state interference with psychological integrity, suggesting that the cases have recognized an infringement of section 7 only for “serious psychological incursions resulting from state interference with an individual interest of fundamental importance.”³⁹

It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the section 7 security of the person interest. While these fundamental personal choices would include the right to make decisions concerning one’s body free from state interference or the prospect of losing guardianship of one’s children, they would not easily include the type of stress, anxiety and stigma that results from administrative or civil proceedings.... [The] alleged right to be free from stigma associated with a human rights complaint does not fall within [the protection of section 7]. The prejudice to the respondent in this case ... is essentially confined to his personal hardship.⁴⁰

³⁵ Nathalie Des Rosiers “The Legal and Constitutional Requirements for Legal Aid” in Ontario Legal Aid Review, above note 3, 503 at 532-533. By combining protection for both “liberty” and “security of the person,” Des Rosiers’ list includes the concerns of both *G.(J.)* and the cases concerning the “liberty” interest, discussed below. See also Audrey Macklin, “Report on Immigration Law” in Ontario Legal Aid Review, above note 3, at 969.

³⁶ See also Thompson, above note 12, for a wide description of claims potentially included in section 7.

³⁷ [2000] 2 S.C.R. 307.

³⁸ Four dissenting judges held that the case could be decided without addressing the *Charter* issues at all; for these judges, the issue was one of abuse of process in administrative law. For the five judges in the majority, the case raised issues of both administrative law and *Charter* protections. However, Bastarache J., writing for the majority, concluded after a brief overview of the relevant principles that the liberty interest in section 7 was not engaged at all; the case focussed on the claim of security of the person.

³⁹ *Id.*, at para. 82.

⁴⁰ *Id.*, at paras 83 and 86. The majority judgment also noted the court’s decision in *R. v. O’Connor*, [1995] 4 S.C.R. 411, in which the court held that disclosure of therapeutic records in sexual assault cases represented direct state interference with a complainant’s psychological integrity. The court also distinguished the human rights context from the stigma of criminal law cases, citing *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892: “if the purpose of the impugned proceedings is to provide a vehicle or act as an arbiter for redressing private rights, some amount of stress and stigma attached to the proceedings must be accepted.” *Blencoe*,

Thus, the *Blencoe* decision confirms that an infringement of the security of the person interest in section 7 requires state action that has a serious and profound effect on psychological integrity. At the same time, *Blencoe* held that there is no engagement with the interest in security of the person merely as a result of being a respondent in human rights proceedings, and concluded that the harm to the respondent did not arise primarily from the filing of human rights complaints. Thus, a reading of *G.(J.)* and *Blencoe* suggests that it is the consequences of legal proceedings, not the fact of participating in them, which will attract the interest in security of the person where the potential consequences are profound and serious. In this context, proceedings that may result in the removal of children from their family, or the committal of a person to an institution, or a decision to refuse refugee status to a person whose life is in danger are arguably matters of “security of the person” in a way that being a respondent to a human rights complaint is not.

In this context, moreover, decisions in lower courts that security of the person does not encompass a right to access the necessities of life may also be suspect, if the test is one of potential consequences which are profound and serious.⁴¹ Nonetheless, in *R. v. Banks*, an Ontario court recently held that security of the person in section 7 did not encompass a right to economic survival, including the right to work.⁴² Clearly, these issues fundamentally challenge the extent to which the *Charter*’s protection should be available to those most economically disadvantaged in Canadian society. As John Whyte argued in 1983, security of the person should be interpreted to include the economic capacity to satisfy basic human needs, including claims about being removed from a welfare programme, being subjected to the confiscation of tools essential to one’s work, or having a license cancelled when it is essential to the pursuit of one’s occupation. According to Hogg, such an interpretation of section 7 is incompatible with the placement of section 7 within “legal rights” in the *Charter*; as well, it “would bring under judicial scrutiny all of the elements of the modern welfare state.”⁴³

In a recent examination of the limits on the meaning of security of the person, Patricia Hughes supported a more expansive interpretation of section 7,

above note 37, at 96. According to Lorne Sossin, “It is questionable ... whether the presence or absence of stigma is the best approach to assessing the requirement of legal aid.... Common law participatory rights in administrative law rest on an independent entitlement to fairness in the administrative process.” Sossin, “Developments in Administrative Law: The 1999-2000 Term” (2000) 13 *Supreme Court Law Review* (2d) 45, at 54.

⁴¹ Des Rosiers, above note 35, at 534. As she stated, “A minimal class analysis ... shows that the interpretation of section 7 protects the rights of the already advantaged. Human dignity means the right to make fundamental decisions about one’s life in a middle-class context... .” See *Masse v. Ontario* (1996), 134 D.L.R. (4th) 20 (Ont. Div. Ct.); leave to appeal to the C.A. and to the S.C.C. refused. Note that Des Rosiers was writing prior to the decision in *G.(J.)*; these issues will also be explored in relation to the equality analysis and section 15.

⁴² [2001] O.J. No. 3219. The accused alleged “state interference with a person’s physical or mental integrity in matters of fundamental importance” in relation to the restrictions on begging and the ban on squeegeeing in the *Ontario Safe Streets Act*.

⁴³ John Whyte “Fundamental Justice” (1983) 13 *Manitoba Law Journal* 455; Hogg, above note 10, at section 44.8.

suggesting that there is a need to understand access to the legal system as a means of enforcing the legal rights of citizens: “Access to the legal system, in a country governed by the rule of law theoretically and by a panoply of laws in fact, ought to have recognition as an independent interest.”⁴⁴ As a result of her analysis, she concluded that it is “part of the substantive enjoyment of rights that one be able to access them,” and that many people in Canada who lack knowledge of substantive legal provisions or the skill to navigate procedural requirements in relation to benefits provided by law (just like J.G.) need state-funded counsel in proceedings initiated by the state.⁴⁵ These arguments are fundamental to a process of re-examining a constitutional entitlement to civil legal aid services.

SECTION 7: “LIBERTY”

The reasoning in *G.(J.)*

The concurring judgment in *G.(J.)* held that this case invoked the liberty interest, as well as the security of the person interest, of section 7 of the *Charter*. Reinforcing the analysis of the dissenting judgment of Bastarache, J.A. in the New Brunswick Court of Appeal,⁴⁶ and relying on the analysis of La Forest J. in *B.(R.) v. Children’s Aid Society of Metropolitan Toronto*⁴⁷ and of Wilson J. in *R. v. Morgentaler*⁴⁸, the concurring judgment in the Supreme Court of Canada in *G.(J.)* concluded that wardship proceedings implicate the fundamental liberty interests of parents:

The result of the proceeding may be that the parent is deprived of the right to make decisions on behalf of children and guide their upbringing, which is protected by section 7. Though the state may intervene when necessary, liberty interests are engaged of which the parent can only be deprived in accordance with the principles of fundamental justice. Interpreting the interests here as protected under section 7 also reflects ... equality values ... [para. 118].

⁴⁴ Patricia Hughes “New Brunswick (*Minister of Health and Community Services*) v. *G.(J.)*: En Route to More Equitable Access to the Legal System” (2000) 15 *Journal of Law and Social Policy* 93, at 113. According to Hughes, “citizenship ... is measured in significant part by our capacity to obtain remedies for harms done to us, to guard against overzealous government intervention and to vindicate our definition of self.” *Ibid.* See also Martha Jackman, “From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees Through *Charter of Rights* Review” (1999) 14 *Journal of Law and Social Policy* 69; and Jennifer Nedelsky “Reconceiving Autonomy: Sources, Thoughts and Possibilities” (1989) 1 *Yale Journal of Law and Feminism* 7.

⁴⁵ Hughes, above note 44, at 115.

⁴⁶ (1997) 145 D.L.R. (4th) 349.

⁴⁷ [1995] 1 S.C.R. 315. Although the specific question of parental rights to liberty was considered by the Supreme Court of Canada in *B.(R.)*, the result was inconclusive: four justices (including La Forest, J.) accepted the existence of such a parental right, four did not accept its existence, and one declined to decide the point.

⁴⁸ Above note 17.

According to the dissenting judgment in the New Brunswick Court of Appeal, this right extended beyond criminal law and beyond physical liberty.⁴⁹ Similarly, the concurring judgment in the Supreme Court of Canada (adopted by three of the Justices) concluded that the liberty interest was engaged on the facts of *G.(J.)*, and that it must be interpreted broadly “in accordance with the principles and values of the *Charter* as a whole [para. 117]. Moreover, as the concurring judgment noted, this view of the liberty interest was not rejected by a majority of the Supreme Court in other cases.⁵⁰ In such a context, it is arguable that an expansion of the liberty interest is possible.

Re-thinking “liberty” in the context of *G.(J.)*

G.(J.) is significant for its re-consideration of the scope of the “liberty” interest in section 7, although the reasoning continues to leave some questions unanswered. As is evident in the reasoning in the case at all levels, there remains a lively issue about the concept of liberty in the *Charter* following the Supreme Court’s decision in *B.(R.) v. Children’s Aid Society of Metropolitan Toronto*.⁵¹ In that case, which concerned the rights of Jehovah’s Witnesses to withhold medical treatment for their child, there were a number of different opinions expressed about the scope of the liberty interest in section 7. Lamer C.J. held that the liberty interest was engaged only where the coercive power of the state was involved, particularly in relation to criminal or penal law; while three other justices held that the exercise of parental liberty which endangers the life of a child falls completely outside section 7. Sopinka J. expressed no view on the matter because there was no breach of the principles of fundamental justice. La Forest J., on behalf of L’Heureux-Dubé, Gonthier and McLachlin JJ., identified “a protected sphere of parental decision-making” within section 7, which means that state intervention must be justified under the principles of fundamental justice.⁵² In the majority decision of the New Brunswick Court of Appeal in *G.(J.)*, the division of views in the Supreme Court in *B.(R.)* created reluctance to characterize the interference with parental decision-making as an infringement of the liberty interest.

Dissenting in the Court of Appeal, however, Bastarache and Ryan JJ. noted a number of cases which had held that section 7 applied to parental rights, and referred to international covenants and academic literature supporting a broader interpretation of “liberty” in section 7; accordingly, the dissenting justices held that “liberty” in section 7 encompassed “essential personal rights that are inherent

⁴⁹ Above note 46, at 48.

⁵⁰ See *G.(J.)*, paragraph 117, referring to *R. v. Morgentaler*, above note 17; and *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844.

⁵¹ Above note 47.

⁵² *Ibid.*

to the individual and consistent with the essential values of our society.”⁵³ Thus, in the concurring reasons of three justices in the Supreme Court in *G.(J.)*, the “strong views of liberty” expressed by La Forest J. in *B.(R.)* and adopted by the dissenting judges in the Court of Appeal in *G.(J.)* were accepted [paras 117 and 118]. Moreover, even the majority judgment in *G.(J.)* held that section 7 is “not limited solely to purely criminal or penal matters” [para. 65]. Thus, even though the majority in *G.(J.)* declined to decide the case on the “liberty” interest, the decision may have some significance for the interpretation of section 7 for the future. As Thompson suggested, “the same “liberty” points made by La Forest in *B.(R.)* can be used as “security” arguments.”⁵⁴

More recently, the Ontario Court of Appeal reviewed the section 7 concept of liberty in the criminal law context in *R. v. Parker*;⁵⁵ “liberty” was held to encompass not only the risk of imprisonment, but also the right to make decisions of fundamental personal importance (including the right to choose to smoke marijuana to alleviate the life-threatening effects of epilepsy). The court held that the liberty interest was infringed, and that the legislation absolutely prohibiting the accused from access to this medication contravened the principles of fundamental justice. Thus (in relation to the liberty interest in section 7) for both criminal and civil law matters, it is arguable that *G.(J.)* has expanded the scope of “liberty” even though it remains difficult to articulate it precisely.

The traditional concept of liberty, the right of a citizen to be protected from interference from the state, was carefully assessed by Dyzenhaus; he concluded that the priority accorded to “negative liberty” by provincial legal aid plans (through their relatively more generous provision of legal aid in criminal matters) distorted both the allocation of resources within criminal law and also the distribution of legal aid resources overall.⁵⁶ Although Dyzenhaus was clear that

⁵³ Court of Appeal, above note 46, at 368. The dissenting judgment referred to the *International Covenant on Civil and Political Rights*, section 9(1), recognizing that it seemed to limit “liberty” and “security” to their physical aspect; but also noted the *Universal Declaration of Human Rights*, article 25 which refers to the right to security in the event of unemployment, sickness, disability, widowhood, old age and other lack of livelihood in circumstances beyond [one’s] control (Emphasis in the judgment). Bastarache J. also approved of the views of Whyte, above note 43. For a brief overview of the right to counsel pursuant to international covenants, see Mossman, above note 5, at 38 ff.

⁵⁴ Thompson, above note 12, at 75. Thompson also noted that the application of the test for determining whether a parent in child protection proceedings required counsel means that there will be a need for counsel in most cases. By contrast, cases in which counsel will not be required, “I can count ... on one hand, with fingers to spare.” *Ibid.*, at 76. Hughes described the reasoning about section 7 in *G.(J.)* as “painful parsing:” see Hughes, above note 44, at 99 ff.

⁵⁵ (2000) 188 D.L.R. (4th) 385; see also *R. v. Mills*, above note 32, where the court extended the protection of security of the person to witnesses (victims) in relation to the obligation to produce therapeutic records.

⁵⁶ David Dyzenhaus, above note 34, at 482 ff. In particular, Dyzenhaus suggested that the power of the idea of negative liberty is revealed in the extent to which those who want to achieve more legal aid services in family law matters have attempted to assimilate their claims to those of negative liberty in the criminal law context: see Patricia Hughes, “The Gendered Nature of Legal Aid” in F.H. Zemans, P.J. Monahan and A. Thomas, eds., *Report on Legal Aid in Ontario: Background Papers* (North York: Osgoode Hall Law School, 1997) 29; and Mossman,

his inquiry related to normative justifications for legal aid, not constitutional requirements, he concluded that there is a “plurality of values at stake when it comes to justified claims on legal aid” and that it is problematic to accord priority to the concept of negative liberty.⁵⁷ Arguing against the “box approach” (i.e. categories) to setting priorities for legal aid services, Dyzenhaus examined the areas of criminal law, social assistance, and “family law and civil law;” in relation to the latter category, he focused on the “private law” aspect of divorce proceedings, but suggested that the absence of negative liberty (and the coercive role of the state) was fundamentally irrelevant to the need for legal aid:

The normative point made is broader in scope than the point about the unfairness of situations in which one’s rights are contingent on proper access to the law but where one’s lack of both appropriate information and advocacy skills give one unequal access. It is also about the fact that one’s position of inequality is worsened when one is contesting the law with another private actor who is vastly more powerful than oneself. What should matter is not the source of the power which worsens one’s situation of inequality before the law, but the fact that the situation has worsened.⁵⁸

In the end, Dyzenhaus advocated principles for legal aid services which avoid the dominance of “traditionally powerful constituencies in ways that turn attempts to establish the priority of certain interests into *de facto* claims on exclusivity.”⁵⁹ Without diminishing the importance of legal aid services in criminal law matters, these arguments reveal the need to share legal aid resources equitably with claimants in civil law cases, especially in a context of scarce resources. To the extent that there is increased recognition in the concurring judgment of the Supreme Court of Canada and in the dissenting judgment of the New Brunswick Court of Appeal that cases like *G.(J.)* engage the “liberty” interest in section 7 of the *Charter*, Dyzenhaus’ argument may be useful in establishing constitutional recognition, as well as normative justification, for legal aid services in civil law matters.⁶⁰

“Gender Equality, Family Law and Access to Justice” (1994) 8 *International Journal of Law and the Family* 357, at 365-367.

⁵⁷ Dyzenhaus, above note 34, at 489.

⁵⁸ Dyzenhaus, above note 34, at 497. As is evident, Dyzenhaus’ argument engages ideas about equality in access to justice, issues which are discussed later in relation to section 15 of the *Charter*. It is important, however, to note that both liberty and equality concerns are included in his normative justifications for legal aid.

⁵⁹ Dyzenhaus, above note 34, at 501.

⁶⁰ It is interesting that the Supreme Court of Canada released its decision in *Winters v. Legal Services Society*, [1999] 3 S.C.R. 160 in the same time period as *G.(J.)*. Although *Winters* did not involve a *Charter* claim, the court held that an appropriate interpretation of the B.C. *Legal Services Society Act* required the provision of state-funded counsel in a disciplinary hearing for a prisoner who faced the possibility of solitary confinement. At the same time, Hughes has suggested that *Winters* may have required only “services ordinarily provided by a lawyer” rather than the services of a lawyer; and cautioned that the decision in *G.(J.)* might be interpreted similarly: see Hughes, above note 44, at 110.

SECTION 7: THE “PRINCIPLES OF FUNDAMENTAL JUSTICE”

The reasoning in *G.(J.)*

The decision of the Supreme Court of Canada in *G.(J.)* held that in government-initiated proceedings which involve section 7 interests, “... [the government] is under an obligation to do whatever is required to ensure that the hearing be fair” [para. 2]. The majority judgment stated that fair proceedings may require representation by counsel, but not in all circumstances [para. 86]. At the same time, the majority judgment characterized J.G.’s case as “unusual” [para. 83], and suggested that the test identified by the court for determining a need for legal counsel is applicable only to child protection proceedings [para. 104]. Thus, according to the majority judgment, section 7 does not provide “... an absolute right to state-funded counsel at all hearings where an individual’s life, liberty and security is at stake, and the individual cannot afford a lawyer” [para. 107]. The test is whether such counsel is necessary to achieve a fair trial.

By contrast, the concurring judgment characterized the “fair trial” test as requiring a trial judge to consider “the important value of meaningful participation in the hearing, taking into account the rights affected, and the powerlessness that a reasonable person ... may legitimately feel when faced with the formal procedures and practices of the justice system” [para. 125]. Thus, although not an absolute right, the concurring judgment suggested that state-funded counsel might be required more often to achieve the goal of a fair trial than the majority judgment indicated; taking account of all the factors, the concurring judgment concluded that “it is likely that the situations in which counsel will be required will not necessarily be rare” [para. 125].

The requirements of “fundamental justice”

At the heart of both these opinions is an acknowledgement that a trial judge is required to exercise discretion in determining whether the goal of a fair trial can be achieved without legal representation by counsel. For Chief Justice Lamer, application of the test will only rarely result in an order to appoint counsel, while Justice L’Heureux-Dubé suggested, by contrast, that the occasions when trial judges must exercise such discretion will not necessarily be rare. In practice, there has been no flood of reported decisions after *G.(J.)* in which trial judges have ordered the appointment of state-funded counsel; at the same time, however, none of the reported cases have presented the same degree of compelling facts in terms of the three elements of the *G.(J.)* test: seriousness of interests, complexity of

proceedings, and capacities of the applicant.⁶¹ At the same time, the negative outcomes in applications for state-funded counsel must take account of the extent to which provincial legal aid programmes have altered their criteria for assistance so as to provide more extensive coverage for parents in child protection proceedings; thus, there is less opportunity for a trial judge to exercise discretion pursuant to the *G.(J.)* decision.⁶²

In *Re J.J.*, the Nova Scotia Supreme Court considered the application of section 7 and the principles of fundamental justice in relation to the provisions of the *Adult Protection Act*; in particular, the court was concerned to define the scope of judicial authority in relation to orders pursuant to the statute.⁶³ The court concluded that the approach in *G.(J.)* was applicable to the situation of vulnerable adults (who were in need of protection), and that decision-making must therefore comply with the principles of fundamental justice. The court reiterated that the principles are both substantive and procedural⁶⁴ and then outlined a list of possible criteria from the case law, identified by Thompson⁶⁵:

Procedural

- reasonable notice with particulars;
- an adversarial hearing;
- a neutral arbiter;
- advance disclosure by the state;
- *rights to legal representation [G.(J.)]*

⁶¹ See above note 30. In child protection proceedings in *P.W.S. v. British Columbia (Director of Child, Family and Community Services)*, above note 26, both the father and mother were represented by counsel, as was the Director. The court declined to order the appointment of counsel for the children, all of whom were under the age of three, distinguishing *G.(J.)* in relation to the facts; the court also stated that *G.(J.)* "makes it clear the particular circumstances in each instance are a factor in deciding whether or not counsel should be appointed" [para. 21]. See also *S.A.K. v. A.C. and Miltenberger v. Braaten*, above note 30. In refusing to order the appointment of counsel to represent the wife in a custody dispute which was part of divorce proceedings, the court in *Miltenberger* stated:

[*G.(J.)*] is distinguishable from the case at bar. Here there is no state action which threatens the security of the respondent's person. This is a court action between private citizens to determine the custody of their children. Moreover, there was no evidence presented that the respondent is indigent. The *Charter* does not guarantee legal counsel for individuals. To do so would be to require governments to spend limited resources in providing legal counsel for private individuals.... [para. 6].

⁶² Such a situation would explain why the reported cases involve matters other than the representation of parents in child protection hearings. Empirical research may also be important in identifying the gaps where legal representation is most acutely needed; in addition, as Rosalie Young demonstrated in her analysis of American states' response to *Lassiter v. Department of Social Services*, it may be that current judicial practices are sometimes more expansive than required by constitutional decisions. See Rosalie R. Young "The Right to Appointed Counsel in Termination of Parental Rights Proceedings: the States' Response to *Lassiter*" (1997) 14 *Touro Law Review* 247. See also *Lassiter v. Department of Social Services* 452 U.S. 18 (1981).

⁶³ [2001] N.S.J. No. 101.

⁶⁴ See *Reference re section 94(2) of the Motor Vehicle Act (BC)*, [1985] 2 S.C.R. 486.

⁶⁵ According to Thompson, above note 12, the criteria were all defined by three cases; *G.(J.)*, above note 9; *B.(R.)*, above note 47; and *K.L.W.*, above note 17.

- an opportunity to present one’s case effectively;
- a burden of proof on the Protective Agency;
- a heightened standard of proof;
- an opportunity for timely status review;
- a fair and prompt post-apprehension hearing; and
- a right to protection hearing within a reasonable time.

Substantive

- apprehension only as a last resort;
- relieving a parent of custody only when necessary to protect a child’s best interests; and
- limits on the use of permanent wardship orders.⁶⁶

As this list makes clear, there is a significant role for judicial discretion in the determination of what is required by the principles of fundamental justice, or a “fair trial.” This discretion was demonstrated in a British Columbia case⁶⁷ in which the applicant sought to rely on *G.(J.)* to remove the “cap” on the amount of time for preparation and trial work, set out in the legal aid tariff for child protection proceedings. The applicant and her counsel were concerned about substantially-increased time requirements as a result of new developments which increased the complexity of the case - and which changed the estimate of time required for the trial from 6-8 days to five weeks. The court distinguished this case from *G.(J.)* on the basis that the applicant had not been denied legal aid funding, and noted as well that there was no independent or expert opinion to support her counsel’s estimate of time required to provide representation. At the same time, the court expressly rejected the Attorney General’s argument that the court should not inquire into the *level* of legal aid funding.⁶⁸

⁶⁶ See *Re J.J.*, above note 63, at 16; and Rollie Thompson, “The ABC’s of the *Charter*” (unpublished) at 22.

⁶⁷ *J.W. v. M.E.S.*, [2000] B.C.J. No. 985 (British Columbia Supreme Court).

⁶⁸ The court reviewed correspondence between counsel and the legal aid programme, and concluded that the applicant had not met the evidentiary burden of establishing that the allowance in the legal aid tariff was inadequate “in the sense that it will probably impede the effectiveness of counsel to the extent that the hearing will be rendered unfair due to the lack of adequate representation” [para. 18]. As the court stated, however, “there is obviously some minimum threshold level of funding required to make the provision of counsel meaningful and effective to ensure the fairness of the hearing....” [para. 14]. Yet, the court declined to review “the policy of the government in designing its Legal Aid program;” instead, the court was limited to “deciding the *Charter* issue before me, which is not the fairness of the Legal Aid tariff at large, nor of the preparation cap specifically, but whether the fairness of the hearing in this case will be impeded by the cap on preparation” [para. 16]. As a result of this decision, a legal aid staff lawyer took over the mother’s representation: see *Lawyers’ Weekly* (9 June 2000); and *Bala*, above note 20, at 407-408. In another case, *A.B. v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 14, at 3, the Federal Court of Canada held that section 7 of the *Charter* did not require an order for payment of counsel by the federal government where the number of hours of preparation available under Ontario’s legal aid programme was alleged to be inadequate in the context of an immigration hearing, and which might result in the deportation of the applicant. The court held that it would be unwarranted to impose on the federal government an additional constitutional obligation to provide legal aid when funding is already provided under a provincial scheme to which the federal government has contributed.

In both the majority and concurring judgments in *G.(J.)*, instructions were given for trial judges for determining whether the appointment of state-funded counsel is necessary to ensure a fair trial. The majority judgment expressly outlined the procedure to be followed in cases when an unrepresented parent in a custody application seeks state-funded counsel, including an adjournment to permit an eligible applicant to obtain legal aid [paras 103 and 104]. Similarly, the concurring judgment in *G.(J.)* addressed the duty of a trial judge to ensure a fair trial, suggesting that the judge must take into account the important value of meaningful participation in the hearing [paras. 119 and 120]...⁶⁹ In support of this conclusion, Bala suggested that trial judges have jurisdiction to order payment of counsel by provincial and territorial governments, as well as an obligation to raise the issue whenever a litigant in child protection proceedings is unrepresented:

It is submitted that in any case in which a judge considers that an unrepresented litigant in a child protection proceeding may have a constitutional right to counsel, the judge has an obligation to raise this issue as an aspect of the judicial duty to ensure that there is a fair trial.⁷⁰

The requirements of fundamental justice also make it “necessary that parents unable to afford counsel be aware of the relevant criteria.”⁷¹ Moreover, as Hughes suggested, where a trial judge has refused to order state-funded legal aid “on the basis of an inappropriate consideration of the criteria,” it will be necessary to challenge the trial judge’s decision; in this way, as Hughes noted, “monitoring of ‘J.G. orders’ will be necessary to ensure that [even] the entitlement guaranteed by *G.(J.)* is realized.”⁷² As well, there are significant arguments to suggest that fact-

The court expressly stated that “the reasons in *G.(J.)* do not speak to the issue ... whether the right to be provided with counsel at public expense is available against the federal authorities in respect of a federal matter that is covered by the applicable provincial legal aid plan.” In this case, it is arguable that the court should have focused more precisely on the issue of whether state-funded counsel was required, rather than which level of government was responsible for it.

⁶⁹ In several reported decisions after *G.(J.)*, some trial judges expressly identified the applicant’s failure to prove an infringement of section 7 as a basis for not appointing state-funded counsel. Thus, even if the trial judge has a responsibility to ensure a fair trial, issues such as the applicant’s indigence (as in *Miltenberger*) or the validity of a claim about the amount of preparation time needed (as in *J.W. v. M.E.S.*) may need to be proved in evidence to permit the trial judge to assess whether there can be a fair trial without an order for the appointment of counsel (or for increased legal aid funding).

⁷⁰ Bala, above note 20, at 408. Bala suggested that, prior to ordering state-funded counsel, a trial judge should give notice to the relevant legal aid programme to permit the programme to make submissions; and that in some cases, a trial judge could appoint an *amicus curiae* to investigate and argue the issue. These suggestions clearly reveal his view that there is a primary responsibility on the trial judge to determine whether state-funded counsel is required to ensure a fair trial in accordance with section 7 of the *Charter*.

⁷¹ Hughes, above note 44, at 109. Hughes suggested that “women’s help groups can help to transmit this information to their clients, for example; another source is public legal education services.”

⁷² Hughes, above note 44, at 109. As she indicated, of course, there will be a tendency of reviewing courts to defer to the trial judge’s discretion, another aspect of the discretionary nature of the entitlement to state-funded counsel established in *G.(J.)*.

finding and decision-making by judges will be substantially enhanced by providing counsel for indigent litigants.⁷³

Overall, therefore, in terms of substantive entitlement to state-funded counsel pursuant to section 7, the decision in *G.(J.)* confirms that there is no absolute right; rather the need for state-funded counsel must be determined by a trial judge in relation to the judicial responsibility to ensure a fair trial, if there is an infringement of the “security of the person” or “liberty” interests. Thus, much depends on the role of the trial judge and the proper exercise of discretion in the case of an unrepresented litigant. And, where a trial judge has refused to order state-funded counsel, it may be quite difficult for unrepresented litigants to effectively challenge a discretionary decision of this kind.

SECTION 15: “EQUALITY”

The reasoning in *G.(J.)*

The equality provisions of section 15 of the *Charter* were not addressed by either the appellant or the respondents in *G.(J.)*, nor were they reviewed by the majority judgment. However, these arguments were presented by intervenors in the case, and the concurring judgment expressly acknowledged that “all *Charter* rights support and strengthen each other” [para. 112]. As a result, the concurring judgment suggested that section 7 rights “... must be interpreted through the lens of sections 15 and 28” [para. 115]. In addition to using section 15 as an interpretive principle, the concurring judgment suggested that the equality guarantees of section 15 were relevant in *G.(J.)* because single mothers are disproportionately affected by child protection proceedings [para. 113].⁷⁴ Moreover, “issues of fairness in child protection hearings also have particular importance for the interests of women and men who are members of other disadvantaged and vulnerable groups, particularly visible minorities, Aboriginal people, and the disabled” [para. 114].

⁷³ For example, see Macklin, above note 35, at 972-974; and Cossman and Rogerson, above note 32, at 824-826. In the context of family law matters, Cossman and Rogerson reported problems of preparing documents without expert assistance, often in circumstances where the litigants were not fluent in English, and where there was inadequate information to assist in preparing affidavits and pleadings: “they leave out facts and the court is not provided with the necessary information.” *Ibid.*, at 824.

⁷⁴ See also the coalition factum of the Women’s Legal Education and Action Fund, the National Association of Women and the Law, and the Disabled Women’s Network in Canada.

Equality and civil legal aid services

In the legal aid literature, a recurring assertion about inequality in legal aid services focuses on gender.⁷⁵ As Hughes commented, “it is a fair working assumption that in collective terms, women and men use the legal system for different purposes (as well, of course, for the same purposes);”⁷⁶ in particular, statistics suggest that higher proportions of men, by comparison with women, are accused of criminal offences;⁷⁷ and that women are more likely than men to require legal services for family law matters. Thus, if legal aid services are designed to provide priority for representation in criminal law matters, men will benefit from legal aid more often than women; and as Dyzenhaus argued, in the context of scarce resources for legal aid services, a “priority” area of service may become one of “exclusivity.”⁷⁸ According to Hughes, this *gendered pattern* in the allocation of legal aid resources “implicates the state in the continued subordination of women:”

Put another way, both women and men require the legal system to defend themselves, yet find that it is not equally available to them. To the extent that they do not have equivalent access to it, women are denied the protection of the legal system: they are, in the literal sense of the phrase, denied “the equal benefit of the law” guaranteed by section 15.⁷⁹

⁷⁵ See Hughes in F.H. Zemans, P. Monahan and A. Thomas, eds., above note 56, at 29; Hughes, “Domestic Legal Aid: A Claim to Equality” (1995) 2:2 *Review of Constitutional Studies* 203; Mossman, “Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change” (1993) 15 *Sydney Law Review* 30; and Des Rosiers, above note 35.

⁷⁶ Hughes, “Domestic Legal Aid,” above note 75, at 205.

⁷⁷ For a good analysis of women accused of criminal offences, see Dianne Martin, “Punishing Female Offenders and Perpetuating Gender Stereotypes” in Julian V. Roberts and David P. Cole, eds. *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 186.

⁷⁸ Dyzenhaus, above note 59, and accompanying text.

⁷⁹ Hughes “Domestic Legal Aid,” above note 75, at 206. As Hughes suggested, “the factual underpinning for the conclusion that men make greater demands on the criminal legal aid system than do women and that women have greater needs for domestic legal aid assistance needs to be definitively established.” *Id.* at 204. This gendered pattern of legal aid services is arguably revealed, for example, because “among other criminal charges for which men seek legal counsel are those involving abuse of women, sexual and non-sexual. Women, on the other hand, need the assistance of the legal system to defend themselves against violence by men (through seeking a restraining order, for example) or to remove themselves from abusive or otherwise subordinate domestic relationships:” Hughes, *id.* at 205- 206. As well, “the possibility of state-detention gives rise to a right to counsel, but the reality of spouse- detention (the inability to leave an unsatisfactory home life) does not;” and similarly, “deprivation of livelihood may justify the granting of legal aid, but the deprivation of alimony or support may not, even if the economic impact on the individual is just as serious: Des Rosiers, above note 35, at 534. In this context, Bala argued that an indigent debtor, who has failed to pay court-ordered child support, may well be entitled to state-appointed counsel before a court makes a finding that results in imprisonment for contempt; although women may not be entitled to legal aid to seek an order for child support: Bala, above note 20, at 401. As Bala noted, however, courts have been unwilling to find that a license suspension (for failure to pay child support) results in deprivation of “liberty or security of the person:” see *Westendorp v. Westendorp* (2000), 8 R.F.L.

As Hughes argued, women's claim to more equitable access to legal aid (or for a domestic legal aid programme equivalent to the criminal legal aid programme) rests, not on an economic ground, but rather on the integrity of the legal system itself and its ability to protect all members of society.⁸⁰ Such an analysis reveals how protection for "security of the person" in section 7 may be linked to the equality guarantees in section 15: as Dyzenhaus suggested, if a family law litigant is unaware of her rights or unable to exercise them without state-funded counsel, the result is inequality before the law because the legal system is fostering (rather than constraining) the abuse of power and resources by the other party.⁸¹ Moreover, the increasing complexity of family law exacerbates this inequality of knowledge, resources and power.⁸² In this way, the fundamental values expressed in section 15 may be used to interpret the rights in the *Charter*, especially section 7, in relation to civil legal aid services.

In addition, in *Law v. Canada (Minister of Employment and Immigration)*,⁸³ the Supreme Court of Canada formulated an approach to section 15 which included the promotion of human dignity by preventing discrimination. The test unanimously adopted by the court requires differential treatment between a claimant and others; treatment which is based on enumerated or analogous grounds; and a discriminatory purpose or effect of the challenged law. In applying the test, the court expressly concluded that human dignity requires rejection of "stereotypical characteristics:"

... human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits.... Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the

(5th) 225 (Ont. S.C.J.); *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1999), 134 C.C.C. (3d) 161 (Ont. C.A.), varied (1999), 185 D.L.R. (4th) 711 (Ont. C.A.).

⁸⁰ Hughes "Domestic Legal Aid," above note 75, at 215. This argument may be strengthened by the fact that members of enumerated and analogous groups in section 15 are over-represented among the poor, even though poverty has not been accepted as an analogous ground: see Janet Mosher, "Poverty Law - A Case Study" in Ontario Legal Aid Review, above note 3, at 913; and Martha Jackman and Bruce Porter, "Women's Substantive Equality and the Protection of Social and Economic Rights under the *Canadian Human Rights Act*" in Status of Women Canada, *Women and the Canadian Human Rights Act: A Collection of Policy Research Papers* (Ottawa: Status of Women Canada, 1999) at 43.

⁸¹ Dyzenhaus, above note 34, at 487. See also Cossman and Rogerson, above note 32, at 819. See also the discussion of subordination of poor women in child protection proceedings in the United States in Colene Flynn, "In Search of Greater Procedural Justice: Rethinking *Lassiter v. Department of Social Services*" (1996) 11 Wisconsin Women's Law Journal 327. See above note 62 for further discussion of *Lassiter*.

⁸² Cossman and Rogerson, above note 32, at 777-784. See also the analysis of "unmet legal needs" and concerns about unrepresented litigants: 820-829. While this analysis focuses on family law matters, similar arguments could be made in relation to refugee hearings and other poverty law issues.

⁸³ [1999] 1 S.C.R. 497.

manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?⁸⁴

Such an inquiry is arguably sufficiently broad to encompass a claim about disparity in entitlement to legal aid services, at least based on the grounds of sex in relation to family law services. It might also provide a basis for claiming a right to civil legal aid services in other cases, especially when the claimant's contextual circumstances include elements of vulnerability and "restricted access to fundamental social institutions."⁸⁵

Any such argument fundamentally engages ideas about the meaning of rights for Canadians. As Hughes argued, "where ... an individual requires access to the legal system to realize the rights the law has given to her, lack of meaningful access is a contravention of the promise inherent in the rights."⁸⁶ She also suggested that recognition of individual rights is particularly significant since those who cannot afford legal services are so often also reliant on governmental provision of goods and services. In this way, the capacity to "make real" the entitlements created by law is an integral part of the entitlement.⁸⁷ In the U.S. context, Colene Flynn explored the need for meaningful participation on the part of litigants as a goal of the justice system, suggesting that assessments of power balances (and imbalances) is necessary to achieve decisions that are fair.⁸⁸ State-funded counsel, in this context, is a means to ensuring equality for litigants in the justice system.

⁸⁴ *Law*, at para. 53. The court held that the determination of the "appropriate comparator" and the evaluation of contextual factors to decide whether legislation demeans a claimant's dignity must be conducted from the perspective of the claimant; the focus of the discrimination inquiry has both subjective and objective aspects (at para. 59-60). The four contextual factors include pre-existing disadvantage, the relationship between grounds and the claimant's personal circumstances, the ameliorative purpose or effects of the law; and the nature of the interest affected. In relation to the latter factor, the court stated that it is necessary to consider whether the distinction "restricts access to a fundamental social institution or affects a basic aspect of full membership in Canadian society, or constitutes a complete non-recognition of a particular group:" *Law*, at para. 88.

⁸⁵ For examples, see *Des Rosiers*, above note 35; *Macklin*, above note 35; *Mosher*, above note 80; *Thompson*, above note 12; and *Mossman*, above note 4.

⁸⁶ *Hughes*, above note 44, at 113.

⁸⁷ *Hughes*, above note 44, at 114, and citing *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624: sign language interpretation is an integral part of the provision of health services, not an adjunct or separate service. *Hughes* made these arguments in the context of an analysis of section 7, but they overlap, to some extent at least, with the formulation of the context of discrimination in *Law*. See also *Mossman*, above note 56, at 364: "In the context of women's greater relative poverty, 'neutral' categories of entitlement to legal aid services must be assessed in terms of their effects in practice (their *substantive* results), not simply on the basis of their use of (*formal*) gender neutral language."

⁸⁸ *Flynn*, above note 81, at 330-331. In particular, *Flynn* argued that the presumption of equality among litigants impeded the achievement of fairness in *Lassiter* because test in *Matthews v. Eldridge* 424 U.S. 319 (1976) failed to account for the mother's lack of power in the proceedings: "The court afforded an indigent mother fewer, not more, procedural guarantees by not factoring into the equation her power and ability to participate in the proceeding:" *id.*, at 332. In this way, the provision of state-funded counsel is essential to achieve equality goals.

SECTION 1

The reasoning in *G.(J.)*

The majority judgment considered section 1 only briefly. Having concluded that there was an infringement of security of the person in section 7 which did not meet the requirements of fundamental justice, the court considered whether the breach could be saved by section 1. Applying the *Oakes* test,⁸⁹ the majority held that the “deleterious effects of the [government’s legal aid] policy far outweigh the salutary effects of any potential budgetary savings” [para. 98]. There was no discussion of section 1 in the concurring judgment, in relation to either section 7 or section 15.⁹⁰

Section 1 and the limits of state-funded counsel

Recognition of the principle that section 1 may uphold an infringement of section 7 only in exceptional circumstances is appropriate for both the reasons identified in the majority judgment: the significance of the rights protected by section 7 and the importance of ensuring procedures which accord with the principles of fundamental justice. The majority’s view that financial considerations were not sufficient to justify the infringement is also appropriate, even if the formulation in the judgment was “unsophisticated.”⁹¹ It has also been suggested that “costs” may need to take into account the additional costs to the justice system of unrepresented litigants.⁹² And, in any event, by contrast with section 7, it is clear that section 1 must be considered in the context of an infringement of section 15; thus, the court’s assertions about the inappropriateness of considering financial issues may be significant. However, to the extent that courts are concerned about the legislative role in balancing fiscal responsibilities, it is arguably more appropriate to address these concerns by declaring the infringement of the

⁸⁹ Above note 14. As the majority judgment noted, section 7 violations are not easily saved by section 1, because the rights protected by section 7 “are significant and cannot ordinarily be overridden by competing social interests,” and also because it is only rarely that a violation of the principles of fundamental justice (specifically the right to a fair hearing) can be upheld pursuant to section 1 [para. 99].

⁹⁰ Graeme Mitchell suggested that the consideration of section 1 by the majority (in the context of section 7 alone) suggested a “softening in the court’s previous reluctance to entertain a section 1 justification for the violation of section 7.” He also criticized the “unsophisticated appreciation for public financial management” evident in the analysis of the relative costs involved in *G.(J.)*: see Mitchell, “Developments in Constitutional Law: The 1999-2000 Term” (2000) 13 Supreme Court Law Review 77, at 110.

⁹¹ Mitchell, above note 90.

⁹² Cossman and Rogerson, above note 32, at 825-829; and Macklin, above note 35, at 982 ff.

Charter, and then permitting the legislature to have an opportunity to rectify it by enacting legislation which meets the requirements of the *Charter*.⁹³

CONCLUSIONS

This review of decided cases and academic literature provides a context for assessing potential arguments to support the establishment of a constitutional right to state-funded counsel in civil matters. In this context, the Supreme Court's decision in *G.(J.)* is significant, not just for the principles enunciated but also for the constitutional values revealed in the differing approaches to the issues. These concluding comments thus address both issues of context and values as well as legal principles in providing arguments to support the continuing evolution of a constitutional right to state-funded counsel in civil matters in Canada.

Context and values

Four themes are evident in this review of the cases and academic literature:

- *Charter* interpretation as an evolutionary process;
- the increasing complexity of the legal system in Canada;
- the need to foster participation in society, particularly for those who are most disadvantaged; and
- the role of judicial discretion.

Charter interpretation as an evolutionary process

This review of the decided cases on some aspects of sections 7 and 15 of the *Charter* reveals how much the meaning of these sections has evolved in the jurisprudence of the Supreme Court of Canada. Although the evolution of law is hardly a new idea, it is nonetheless important to acknowledge the evolutionary nature of decision-making in relation to *Charter* protections. Thus, while critical of some developments in Supreme Court jurisprudence, Hughes reiterated how the court has expressly confirmed that *Charter* rights are not “frozen,”⁹⁴ and that an approach which restricts the evolution of *Charter* protections may undermine the goal of reflecting social change in law. Similarly, even before the *G.(J.)* decision, the Ontario Legal Aid Review suggested that it was “not at all clear that courts would refrain from intervening and finding unconstitutionality if confronted with what appeared to be a plainly discriminatory feature of a legal aid scheme or a level of service that was considered to be so inadequate that the judiciary could not preside over fair trials.”⁹⁵ Thus, if it can be shown that there is

⁹³ For example, see *M. v. H.*, [1999] 2 S.C.R. 3. In response to the decision in the Supreme Court of Canada, the Ontario legislature enacted *The Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act, 1999*, S.O. 1999, c.6.

⁹⁴ Hughes, above note 75, at 51, and citing *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

⁹⁵ Ontario Legal Aid Review, above note 3, at 82.

a recognizable need for civil legal aid services to achieve important objectives that are consistent with underlying values of the *Charter*, a court may hold that the evolution of the *Charter* requires recognition of a constitutional right to state-funded counsel in civil matters.

Increasing complexity of the law and legal regulation

As the academic literature reveals, concerns have been expressed about the rapid pace of legal change and the problems which are experienced by many Canadians in becoming aware of their legal rights and obligations, and implementing them in practice. In the case of family law, for example, Cossman and Rogerson described the major developments that have taken place in family law within the past thirty years: “Put simply, this period of time has seen massive social changes and several waves of legal reform which have generated an increasing and overwhelming demand for legal services in the family law area.”⁹⁶ This kind of rapid change has also occurred in relation to other areas of civil law, as well as in the criminal law context.⁹⁷ The point here is that the need for legal aid services is in part a reflection of relatively greater legal intervention in our daily lives. According to Hughes, an understanding of the extent to which law has become increasingly pervasive and complex means that we must adopt “systemic” approaches to the issue of legal aid services:

... access to the legal system is properly characterized as a systemic matter and not merely one which may be a problem for individuals. As with any right or interest, some individuals will need to claim it more than others, but it is, I would suggest, fundamental to our existence as citizens (in the broad sense of the term). Once lack of access is seen as a systemic “problem,” it is more likely that it will be understood that it requires a systemic solution. This does not automatically mean a particular form of legal aid, but legal access programs which deliver a variety of services as appropriate.⁹⁸

This formulation of the need for access to legal services suggests that the need may be more complex than previously, both in terms of categories of legal problems and also in the kinds of services which may be needed. In this context, the increasing complexity of law and legal regulation represents a significant factor to be considered in determining whether societal changes require a response that fosters more effective access to legal advice and assistance, including a constitutional right to state-funded counsel for a wide variety of civil matters.

⁹⁶ Cossman and Rogerson, above note 32, at 778.

⁹⁷ For some analysis and critique in relation to sentencing issues, for example, see Roberts and Cole, eds., above note 77.

⁹⁸ Hughes, above note 44, at 113.

Participation and access rights (especially for vulnerable Canadians)

Recognition of a constitutional right to state-funded counsel in civil proceedings also helps to foster participation by vulnerable and disadvantaged Canadians in processes of decision-making which affect their lives. As Nedelsky suggested, it is important to have:

... an opportunity to be heard by those deciding one's fate, to participate in the decision at least to the point of telling one's side of the story.... [A] hearing designates [parties] as part of the process of collective decision-making, rather than as passive, external objects of judgment. Inclusion in the process offers ... a sense of dignity, competence and power.⁹⁹

For those who are most vulnerable and disadvantaged, however, the right to participate in proceedings which affect their lives will frequently require legal assistance. Thus, the right to participate is without substantive content in the absence of meaningful arrangements for legal services, arrangements which will also ensure that decision-making is informed about all the facts and circumstances and thereby more just.¹⁰⁰ As Hughes explained, the decision in *G.(J.)* is all too similar to other civil proceedings:

J.G. was, it must be said, asking for very little: only the chance to explain as effectively as she could why she should be able to keep her children. But the legal system requires that she do that in a certain way in a certain environment. Legal counsel mediates Ms G's story and the legal structure into which it must fit. On its face, Ms G. and others in her position will be entitled to that interpreter of the law and of the norms of the system which will decide such an important aspect of their life. Even so, *one is left thinking that the court missed an opportunity in G.(J.) to say more about the need for civil legal aid....*¹⁰¹

The right to state-funded counsel in civil matters, many of which profoundly and seriously affect the lives of vulnerable and disadvantaged Canadians, provides the means for their substantive access and meaningful participation in legal proceedings.

Discretion and facts

The test adopted in *G.(J.)* for determining whether a trial judge should order state-funded counsel is highly discretionary, involving an assessment of three factors: the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the litigant [para. 75]. In relation to each of these factors, there is a need for the trial judge to weigh the circumstances in individual cases, and to determine whether there is a need for state-funded counsel, having regard to the

⁹⁹ Nedelsky, above note 44, at 27.

¹⁰⁰ Thompson, above note 12.

¹⁰¹ Hughes, above note 44, at 116 (Emphasis added).

financial needs of the applicant and the inter-relationship of the three factors. Thus, it appears that an applicant with few abilities to participate effectively may require counsel in a matter which is less complex than a matter in which a more capable applicant is involved. In family law matters, moreover, Bala argued that the facts are highly relevant to the exercise of judicial discretion:

... to successfully invoke the *Charter* in a family law case, it is essential to have a sympathetic factual context, either in terms of the general issues raised or the specific litigant before the court, or preferably both.... [It] is clear that judges are only willing to invoke the *Charter* if the specific facts or the general context of this type of case suggests that this is likely ... to be "the right thing to do." The courts are only willing to use the *Charter* in the family law cases to promote human dignity or social justice, or to promote the interests of children.¹⁰²

In this context, it appears that a constitutional right to state-funded counsel in civil matters may depend on highly discretionary decision-making and the facts in individual cases. Indeed, Dyzenhaus argued that the provision of legal aid should be determined, not on the basis of abstract legal categories, but rather in relation to the interests engaged by the circumstances of individual cases.¹⁰³

The discretion exercisable by a trial judge, as outlined in *G.(J.)* in relation to the principles of fundamental justice, reflects the traditional judicial power to order state-funded counsel in appropriate criminal matters. As the court explained in *Re White and the Queen*, a trial judge may exercise discretion to order state-funded counsel where, because of the complexity of the case, the seriousness of the criminal charges, or other circumstances such as the accused's lack of knowledge or skills, the judge concludes that counsel is needed to ensure a fair trial.¹⁰⁴ As is apparent, there is great similarity between the traditional test for the exercise of discretion as set out in cases like *Re White and the Queen* and the formulation of the test adopted by both the majority and the concurring judgments in *G.(J.)*. The significance of extending this discretion in *G.(J.)* is thus twofold: a trial judge may now exercise this discretion in some civil matters (at least child protection) as well as in criminal cases; and the power to do so is now mandated, not just by the court's inherent power to ensure a fair trial, but also by the requirement of fundamental justice in section 7 of the *Charter*. Moreover, as the Ontario Legal Aid Review noted, the scope of section 7 is broader than the requirement of a fair trial in section 11(d).¹⁰⁵ In this context, it is arguable that there is a constitutional

¹⁰² Bala, above note 20, at 375.

¹⁰³ Dyzenhaus, above note 34. This issue is further addressed below in relation to section 1 and appropriate responses on the part of provincial legal aid programmes.

¹⁰⁴ Above note 5. According to the Ontario Legal Aid Review, this judicial power was not eradicated by the establishment of provincial legal aid programmes in Canada, so that it is possible for a court to exercise its discretion in favour of an accused who has been denied legal aid services. As well, the jurisprudence concerning this judicial discretion has now informed the interpretation of *Charter* provisions such as section 11(d) concerning the right to a fair trial. See Ontario Legal Aid Review, above note 3, at 74-75.

¹⁰⁵ Ontario Legal Aid Review, above note 3, at 79.

requirement to ensure fairness and fundamental justice in both civil and criminal matters, and that the exercise of judicial discretion must conform to these *Charter* requirements. In this way, the exercise of judicial discretion may now be structured by the requirements of the *Charter*.

Thus, having regard to these underlying constitutional values, it is arguable that the *Charter* must be interpreted in accordance with current needs, that the legal system continues to become ever more complex, that there is a need to foster and ensure the participation of the most disadvantaged Canadians in the legal process, and that the exercise of judicial discretion is constrained by the requirements of fundamental justice and the goal of a fair trial. These broad themes, which emerge from a review of the jurisprudence about state-funded counsel in criminal and civil proceedings provide a context for re-evaluating the legal arguments relevant to the evolution of a right to civil legal aid.

Legal principles

As this review has suggested, the *G.(J.)* case reveals that the Supreme Court of Canada engaged in a *Charter* analysis which recognized the need for an evolution of legal principles in accordance with societal needs. As well, the court's decision in *G.(J.)* appeared to take into account the increasing complexity of law, and the right of litigants to meaningful participation in legal proceedings which seriously and profoundly affect their lives. And, it is arguable that the effect of *G.(J.)* is to constitutionalize the context for exercising judicial discretion to order state-funded counsel in appropriate cases; thus, in addition to meeting the common law tests for such an order, courts must also take into account the requirements of fundamental justice pursuant to section 7 of the *Charter*.

*Section 7: security of the person*¹⁰⁶

In this context, it is also important to consider the scope of the court's analysis in relation to specific provisions of the *Charter*. Thus, for example, it may appear that *Blencoe* constrained the scope of protection for "security of the person" in section 7, at least by contrast with the expansive concept enunciated in *G.(J.)*. Yet, having regard to the underlying values in the *G.(J.)* decision, it is arguable that the scope of section 7 in relation to the issue of state-funded counsel for civil proceedings remains unaffected by *Blencoe*. That is, by contrast with the applicant in *G.(J.)*, the claimant in *Blencoe* was seeking to *avoid* legal proceedings, not a *right to participate* in them effectively. In this way, the differing characterization of "security of the person" in *Blencoe* reflects a significantly different context, and does not constrain an expansive conception of the right to state-funded counsel in civil proceedings within the "security of the person" right in section 7.

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For details, see the section of this paper on "security of the person."

*Section 7: liberty*¹⁰⁷

Similarly, it appears that the Supreme Court of Canada is in the process of adopting an increasingly expansive conception of the “liberty” right in section 7. While the concurring judgment in *G.(J.)* held that an expanded view of liberty was engaged by J.G.’s predicament (Justices L’Heureux-Dubé, McLachlin, and Gonthier), their views were also supported by Bastarache J., then a member of the New Brunswick Court of Appeal and now a member of the Supreme Court of Canada. These views were also supported by the Ontario Court of Appeal in *R. v. Parker*, another case in which the “liberty” interest was characterized as an interest that was more expansive than protection from physical interference. This recognition (in both criminal and civil proceedings) that the concept of liberty may engage interests beyond physical interference suggests that Justice La Forest’s conception of liberty (the “strong conception of liberty”) in *B.(R.)* may be gaining support.

*Section 7: fundamental justice*¹⁰⁸

As the cases demonstrate, the Supreme Court’s interpretation of the principles of fundamental justice reflects concern for the substance, not just the form, of legal proceedings. Although the test adopted in *G.(J.)* includes the possibility of significant judicial discretion, it also demonstrates concern to ensure fairness of legal proceedings for those most disadvantaged in Canadian society. In this way, the equality guarantee in section 15 of the *Charter* appears to have been considered, at least to some extent, in the interpretation of the concept of “fundamental justice.” Such an approach is consistent with the normative principles enunciated by Dyzenhaus with respect to the challenge of ensuring fairness within legal aid services.¹⁰⁹

*Section 15: equality*¹¹⁰

In relation to the equality provisions in section 15, the Ontario Legal Aid Review identified three kinds of arguments.¹¹¹ One argument would take account of the distinctions in the level of legal aid resources available to different kinds of cases, and the impact of differential consequences for groups in Canadian society. Arguably, the decision in *G.(J.)* reflects this argument, in its extension of a right to state-funded counsel to child protection matters. The second argument is that section 15 should be read together with section 7, an argument accepted by the concurring judgment in *G.(J.)*, so as “to develop an approach to security and

¹⁰⁷ For details, see the section of this paper on “liberty.”

¹⁰⁸ For details, see the section of this paper on “fundamental justice.”

¹⁰⁹ Dyzenhaus, above note 34.

¹¹⁰ For details, see the section of this paper on “equality rights.”

¹¹¹ Ontario Legal Aid Review, above note 3, at 81-82.

liberty interests which respects equality guarantees.”¹¹² The third argument relates to allegations that the justice system itself is discriminatory on the basis of class, or poverty, issues. This ground has not yet been accepted as an analogous ground within section 15;¹¹³ without necessarily agreeing that issues of class and poverty are outside the scope of the *Charter*, however, it is nonetheless possible to argue that a right to civil legal aid services is different from these other rights: that is, a right to legal aid services is a *process or access right*. Whether or not programmes which distribute societal resources and benefits should have to take account of section 15, it is arguable that the opportunity to participate in decision-making processes is protected by the principles of fundamental justice.

Section 1: limits on constitutional rights to civil legal aid

As several commentators have suggested, the right to state-funded counsel pursuant to section 7 may not require the appointment of a lawyer, or services for all aspects of legal proceedings.¹¹⁴ As well, Hughes suggested that there may be different models of funding for constitutionally-mandated legal services.¹¹⁵ In this context, however, it is important to note that the decision in *G.(J.)* expressly rejected the financial costs of legal representation as a factor in determining constitutional entitlement.¹¹⁶ Such a conclusion necessarily calls on provincial legal aid programmes to exercise creativity to find effective means of providing legal aid services in conformity with constitutional norms. In doing so, it is necessary to take account of underlying constitutional values, as well as established legal principles.

As these concluding comments suggest, designing arrangements for providing civil legal aid services in Canada which meet the requirements of the *Charter* represents a significant challenge. At the same time, it is an essential task to achieve substantive justice for all Canadians, but especially for those who are most disadvantaged in our society. As was suggested by Doug Ewart, a longtime policy-maker in the legal aid context, there is a need to re-think the justice system in terms of systemic bias:

Much involvement with the justice system comes about because of bias against the poor, whether overt or buried within the very structures of the justice system and society as a whole. This bias is even greater against those who are also members of one of the groups traditionally identified in human rights legislation or in section 15 of the *Charter*. *Treating legal aid clients, individually or as a group, as if they were just rich people without money, or white able-bodied males with a one-time legal*

¹¹² Ontario Legal Aid Review, above note 3, at 81.

¹¹³ Ontario Legal Aid Review, above note 3, at 81. See also Des Rosiers, above note 35.

¹¹⁴ Hughes, above note 44; Cossman and Rogerson, above note 32.

¹¹⁵ Hughes, above note 44, at 114.

¹¹⁶ See majority judgment, at para. 100.

*problem, can result in the failure to even see, let alone address, the relevant issues.*¹¹⁷

These are the crucial issues for both the processes of decision-making about legal services to be provided by provincial legal aid plans and also to the overall integrity of the justice system in Canada.

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Is There a Constitutional Right to Legal Aid?

By: Kent Roach*

This opinion will canvas the legal arguments under the *Charter* that can be used to support a constitutional right to legal aid. To do so will require an examination of sections 7, 10(b), 11(d) and 15 of the *Charter*, as well as possible justifications under section 1 of the *Charter* and remedies that can be ordered for any unjustified violation. It will require attention to differences between the arguments that can be made in the context of criminal and civil legal aid. Finally, it will require attention to the breadth of the argument made in favour of legal aid. As will be seen, the arguments in favour of a constitutional right to legal aid become stronger when they are based on the requirements of a fair hearing against the state in specific cases as opposed to a general right to legal aid in all cases.

A GENERAL RIGHT TO LEGAL AID?

In *R. v. Prosper*,¹ the Supreme Court rejected the idea that section 10(b) of the *Charter* imposes a positive constitutional obligation on governments to provide duty counsel services for those arrested or detained. The court stressed that the text of section 10(b) does not include a right to legal aid and that a proposed amendment to section 10 to provide a right for those “without sufficient means to pay for counsel and if the interests of justice so require, to be provided with counsel” had been rejected. It also was influenced by a concern that a positive legal aid obligation “would almost certainly interfere with the governments’ allocation of limited resources by requiring them to expend public funds on the provision of a service....” Finally, it was concerned that “devising an appropriate remedy under circumstances in which a government was found to be in breach of its constitutional obligation for failure to provide a duty counsel would prove very difficult.”²

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¹ [1994] 3 S.C.R. 236 at 265-268.

² *Ibid.* at 268.

It would be wrong to conclude that the court's decision in *R. v. Prosper* in itself disposes of the case against a general right to legal aid. In *Prosper*, Lamer C.J. took care to note: "To be absolutely clear, the issue of whether the *Charter* guarantees a right to state-funded counsel at trial and on appeal does not arise here."³ The only issue decided in *Prosper* was whether section 10(b) of the *Charter*, not sections 7, 11(d) or 15 of the *Charter*, placed a positive obligation on governments to provide duty counsel to provide advice to those arrested and detained regardless of their financial status. Lamer C.J. also indicated that the decision not to specifically include a right to legal aid under the *Charter* would have less weight under section 7 than under section 10(b) because "the courts are far better qualified" to give meaning to the principles of fundamental justice under section 7. Under section 7 of the *Charter*, the court has not been constrained by the intent of the framers not to protect more than procedural fairness or not to affect abortion legislation. Thus it is not likely that the courts would reject an argument for constitutional legal aid under section 7 of the *Charter* simply on the basis that there is no explicit textual basis for that right in the section.

A GENERAL RIGHT TO LEGAL AID IN THE CRIMINAL LAW CONTEXT

In the criminal law context there is a plausible argument that there is a general right to legal aid under section 7 of the *Charter*. Establishing a violation of section 7 of the *Charter* is a two step process that requires first a conclusion that there is a deprivation of the rights to life, liberty or security of the person and second that the deprivation is not in accordance with the principles of fundamental justice.

Right to Life, Liberty and Security of the Person

Most criminal prosecutions would seem to deprive a person of the right to liberty. In *Reference re Section 94(2) of the B.C. Motor Vehicle Act*,⁴ Lamer J. stated:

Obviously, imprisonment (including probation orders) deprives persons of their liberty. An offence has that potential as of the moment it is open to the judge to impose imprisonment. There is no need that imprisonment...be made mandatory.

The court's *obiter* statement that probation orders would threaten the right to liberty is significant. It would suggest that prosecutions culminating not only in imprisonment, but probation orders and conditional sentences would engage the right to liberty. A prosecution resulting in a fine might not affect rights to liberty or security of the person, but it is possible that a person who cannot afford legal counsel may also be unable to pay a fine, and perhaps be imprisoned in default for

³ *Ibid.*

⁴ (1985) 23 C.C.C.(3d) 289.

failure to pay the fine. In short, most criminal prosecutions would affect the accused's right to liberty and security of the person.

Principles of Fundamental Justice

The court has been clear that the principles of fundamental justice reside in the basic tenets of our legal system and within the domain of the judiciary as guardian of the justice system as opposed to the realm of general public policy.⁵ This distinction was recently re-affirmed in *United States of America v. Burns*,⁶ in which the court indicated that under section 7 of the *Charter*, it was less concerned with the broader aspects of the death penalty and more concerned with the narrower aspects of the controversy directly involved with the justice system and the inherent domain of the justice system such as “the investigation, prosecution, defence, appeal and sentencing of a person within the framework of the criminal law.” These narrower issues in particular “bear on the protection of the innocent, the avoidance of miscarriages of justice, and the rectification of miscarriages of justice where they are found to exist.” There is a strong argument that legal aid, especially in the criminal law context, is a matter within the inherent domain of the judiciary as guardian of the justice system.⁷ Courts would likely accept that there is a greater chance for a wrongful conviction or other miscarriage of justice when an accused is not able to afford counsel and is denied legal aid. Unrepresented accused may be assisted by trial judges, but there is a limit to this assistance given the overriding need for the judge to remain impartial and independent. Indeed too much reliance on the judiciary to protect unrepresented litigants may itself infringe basic limitations on the judicial role. In summary, there is a plausible argument that the principles of fundamental justice require that an accused who cannot afford a lawyer have some type of legal aid made available to him or her in most if not all criminal cases.

Despite the plausible argument outlined above in favour of a general right to legal aid under section 7 of the *Charter* in criminal cases, it must be acknowledged that the Courts of Appeal and lower courts that have considered this issue have generally rejected such an argument. As the Alberta Court of Appeal stated in *R. v. Rain*,⁸ with regard to sections 7 and 11(d) of the *Charter*:

⁵ See *Reference re Section 94(2) of the B.C. Motor Vehicle Act* (1985), 23 C.C.C.(3d) 289.

⁶ (2001) 151 C.C.C.(3d) 97 at para. 71.

⁷ The above argument is also strengthened by a number of pre-*Charter* cases recognizing the importance of legal aid. For example in 1976, McDonald J. decided that any judge could appoint counsel for an indigent accused. This was not a general right to legal aid, but rather a right to have the judge consider whether in all the circumstances including the complexity of the case, the need for counsel, and the accused's abilities that counsel should be appointed to ensure a fair trial. *Re White and the Queen* (1976), 32 C.C.C.(2d) 478 (Alta. Q.B.). See also *Re Ewing* (1976), 49 D.L.R. (3d) 619 at 628 (B.C.C.A.) to similar effect. The Supreme Court also recognized before the *Charter* the importance of counsel. *Re Barrette*, [1977] 2 S.C.R. 121 at 124-6.

⁸ (1998) 130 C.C.C. (3d) 167 at paras. 27, 35.

These sections, on their face, do not provide for funded counsel. Both this court in *R. v. Robinson* (1990) 51 C.C.C.(3d) 452 and the Ontario Court of Appeal in *R. v. Rowbotham* (1988), 41 C.C.C.(3d) 1, among others, have held a general right to funded defence counsel cannot be inferred....The authorities establish that funded counsel is not a right in every case, but in some circumstances, where the assistance of counsel is essential in order to assure a fair trial, the *Charter* requires the provision of funded counsel.

The Québec Court of Appeal has similarly indicated that:

[A]lthough the right to counsel is not constitutionally guaranteed in express terms under the *Charter*, where the length or complexity of the proceedings or the circumstances of the accused are such that the accused would not obtain a fair trial without the assistance of counsel, counsel must be provided for him if he does not himself have the means to retain counsel.⁹

The weight of Ontario, Québec and Alberta Court of Appeal decisions under sections 7 and 11(d) suggest that the courts will be reluctant to recognize a right to legal aid in every criminal case. The Supreme Court has recently stated:

Without commenting on their correctness, I note that there are a number of appellate court cases in Canada which have found that legal representation of an accused may be necessary to ensure a fair trial, pursuant to sections 7 and 11(d) of the *Charter*. These cases are noteworthy because the criteria employed by the courts to determine whether counsel was warranted included the seriousness of the interests at stake and the complexity of the proceedings.¹⁰

A RIGHT TO LEGAL AID WHEN REQUIRED TO ENSURE A FAIR HEARING IN A CRIMINAL LAW CASE

The same cases outlined above rejecting a general right to legal aid in all criminal law cases nevertheless recognize that in particular cases given the complexity of the legal issues, the interests at stake and the abilities of the particular accused, legal aid may be required to ensure the accused a fair hearing as required under sections 7 and 11(d) of the *Charter*. The cases suggesting that legal aid is required for a fair trial tend to be decided on the facts of the particular case. The remedy provided by the courts tends to be either a stay of proceedings until counsel is provided to the accused or an order requiring counsel to be appointed and funded. The result of this very well established jurisprudence is that governments should

⁹ *R. v. Sechon* (1995), 104 C.C.C.(3d) 554 at 560 (Que. C.A.). See also, *Deutsch v. Law Society of Upper Canada Legal Aid Fund* (1985), 48 C.R.(3d) 166 (Ont. Div. Ct.); *R. v. Cormier* (1988), 90 N.B.R.(2d) 265 (Q.B.); *R. v. McKibbin* (1988), 45 C.C.C.(3d) 334 (Ont. C.A.); *R. v. James* (1990), 107 A.R. 241 (Q.B.); *Spellacy v. Newfoundland* (1991), 91 Nfld. & P.E.I.R. 74 (Nfld. S.C.); *Mireau v. Canada (Attorney General)* (1991), 96 Sask. R. 197 (Q.B.).

¹⁰ *New Brunswick v. G.(J.)*, [1999] 3 S.C.R. 46 at para. 90.

know that decisions not to fund legal aid may attract judicial intervention and effective remedies under section 24(1) of the *Charter* in individual cases. At the same time, there is no clear or bright line drawn in the cases as to when the unavailability of legal aid will result in an unfair trial and thus require judicial intervention.

A RIGHT TO LEGAL AID IN THE NON-CRIMINAL CONTEXT

The Supreme Court's recent and important decision in *New Brunswick v. G.(J.)*¹¹ makes clear that "section 7 is not limited solely to purely criminal justice or penal matters" and that in some non-criminal cases there will be a *Charter* right to legal aid under section 7 of the *Charter*. In that case, the state sought extension of a custody order for the applicant's children for a further six months. The hearing lasted 3 days and the state called testimony and affidavit evidence from 15 witnesses including expert psychological reports. The court concluded that while not every state action interfering with the parent-child relationship will restrict a parent's right to security of the person under section 7 of the *Charter*, that the extension of the custody order in this case had that effect. Chief Justice Lamer emphasized that state removal of a child "constitutes a serious interference with the psychological integrity of the parent," involved "a gross intrusion into a private and intimate sphere" and resulted in state imposed "stigma and distress" from losing parental status.¹²

The court then found that the parent's security of the person was denied without accordance to the principles of fundamental justice because she had been denied a fair hearing.

In the circumstances of the case, the appellant's right to a fair hearing required that she be represented by counsel. I have reached this conclusion through a consideration of the following factors: the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the appellant.¹³

Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby threatening to violate both the appellant's and her children's section 7 right to security of the person.¹⁴

¹¹ *Ibid.* at para. 65.

¹² *Ibid.* at para. 61.

¹³ *Ibid.* at para. 75.

¹⁴ *Ibid.* at para. 81.

More than mere competence in understanding the proceedings and communicating with the court will be required; the individual “must be able to participate meaningfully at the hearing.”¹⁵

The Supreme Court’s decision in *G.(J.)* that the *Charter* may in some cases require legal aid outside of the criminal context is significant because before that case, there was a plausible argument that *Charter* rights to legal aid were limited to the criminal law context. As discussed above, the section 7 argument in favour of a right to legal aid was strongest in the criminal law context and the section 11(d) right to a fair hearing only applied to accused charged with an offence. Similarly, Article 14(3) of the *International Covenant on Civil and Political Rights*, to which Canada is a party, only specifically contemplated a right to legal aid in the criminal law context.¹⁶ The Supreme Court of Canada had identified article 14(3)(d) as requiring some form of legal aid in *R. v. Brydges*:

This brief overview of Legal Aid and duty counsel systems reveals the extent of Canada’s recognition of the importance of the right to counsel for all persons detained in connection with criminal offences. This recognition extends beyond our own affirmation of the right in the Canadian Bill of Rights...and the *Charter* to our international commitments. For example, Canada is a signatory to the *International Covenant on Civil and Political Rights*.¹⁷

In *G.(J.)*, the Supreme Court has now clearly indicated that the constitutional requirement for legal aid under section 7 of the *Charter* is not limited to the criminal law context.

There are, however, some limitations in extending *G.(J.)* to a purely civil litigation context in which the state is not a party to the litigation and does not, as in the child custody, immigration, prison discipline or civil committal contexts, act in a prosecutorial role. These limitations relate both to the scope of the rights to liberty and security of the person and the principles of fundamental justice as interpreted by the court.

Rights to Liberty and Security of the Person

Chief Justice Lamer reaffirmed in *G.(J.)* his view that “the subject matter of section 7 is the state’s conduct in the course of enforcing and securing compliance

¹⁵ *Ibid.* at para. 83.

¹⁶ Article 14 provides that:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality;

To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case of he does not have sufficient means to pay for it.

Although Article 14(1) of the *International Covenant* states: “All persons shall be equal before the courts and tribunals,” it only identifies specific rights in the criminal process.

¹⁷ [1990] 1 S.C.R. 190 at 214.

with the law, where the state's conduct deprives an individual of his or her right to life, liberty or security of the person." The idea that section 7 is concerned with matters relating to the justice system would not in itself stand as an obstacle to a recognition of a *Charter* right to legal aid in the civil context. All civil litigation including litigation between private litigants involves the justice system and a court could recognize a right to civil legal aid on this basis while still maintaining that there were no general rights to social assistance because such matters were outside the domain of the judiciary as the guardian of the justice system.

The problem in basing a general right to civil legal aid in *G.(J.)* is more in the court's repeated reference to state action as necessary to trigger section 7 of the *Charter*. For example, the court refers to "serious state-imposed psychological stress" and a requirement that "the impugned state action must have a serious and profound effect on a person's psychological integrity."¹⁸ It is possible to argue that civil litigation between private parties implicates the state. For example, the state through the rules of civil procedure requires the parties to respond to pleadings and the state through the sheriff's office may play a role in the enforcement and execution of judgments. Being required to produce documents in a state-initiated proceeding has been held to affect the right to liberty under section 7 of the *Charter*.¹⁹ Nevertheless, the restraints on liberty and security of the person caused by civil litigation do not seem to be the type of state action contemplated in *G.(J.)*. Instead the focus seems to be on cases such as child welfare proceedings and civil commitment procedures when the state is not only a party to the litigation and provides the framework for litigation, but also acts in a prosecutorial role in commencing and maintaining adversarial proceedings against an individual.

The above interpretation of *G.(J.)* is also supported by the decision of the majority of the court in *Blencoe v. British Columbia (Human Rights Commission)*.²⁰ A majority of the court held that delay in processing a human rights complaint did not affect the respondent's right to liberty or security of the person. The court indicated that "in the circumstances of the case, the state has not prevented the respondent from making any 'fundamental personal choice.'"²¹ Similarly, the majority of the court indicated that most of the prejudicial effects on the respondent were related to the allegations made by the private person and that there was not a sufficient causal connection between the state-caused delay and the prejudice suffered. Given the restrictive approach taken in this case, a court could find that the harms suffered by a person in civil litigation were largely the product of an individual's decision to sue and not of state action.

Principles of Fundamental Justice

¹⁸ *Ibid.* at paras. 59, 60.

¹⁹ See, *Thomson Newspapers v. Canada*, [1990] 1 S.C.R. 425.
²⁰ [2000] 2 S.C.R. 307.

²¹ *Ibid.* at para. 54.

Another limitation on reading a general right to legal aid in civil litigation into *G.(J.)* is the court's case by case approach to when an unfair hearing will be caused by the lack of legal aid. Even in the child custody context, the court indicates that:

[A] parent need not always be represented by counsel in order to ensure a fair custody hearing. The seriousness and complexity of a hearing and the capacities of the parent will vary from case to case. Whether it is necessary for the parent to be represented by counsel is directly proportional to the seriousness and complexity of the proceedings, and inversely proportional to the capacities of the parent.²²

In other words, much will depend on the particular issues of the case and the abilities of the particular applicant.²³

Cases from lower courts since *G.(J.)* indicate that caution is in order in deducing a general right to legal aid in the civil context from that case. In *S.A.K. v. A.C.*,²⁴ the Alberta Court of Appeal distinguished *G.(J.)*. The application arose out of an order awarding custody of a child to the mother and denying both custody and access to the father. The case was distinguished because it "involves private civil litigation where custody had been disputed for years." *G.(J.)* was characterized as a situation where "Government action triggered that case and the Court imposed limitations." Although no mention is made of the early *Charter* case of *Dolphin Delivery*,²⁵ this decision seems to make clear that any argument about constitutional entitlement will run up against the *Dolphin Delivery* decision limiting *Charter* scrutiny to government action and removing it from litigation between private parties.²⁶

The *Dolphin Delivery* argument is also used in *Mill v. Hardy*,²⁷ where it is stated "Here, it is not the state seeking to take Mr. Mill's child. This is a proceeding between two parents." In this case involving an appellant's request to have counsel appointed to him (he had a legal aid certificate but was unable to find someone willing to represent him), the court also concluded that the case was not

²² *Ibid.* at para. 86.

²³ Albeit more as a matter of statutory than *Charter* interpretation, the court took a similar case by case approach in the context of prison discipline proceedings resulting in solitary confinement. Binnie J. stated: "A rule that required the [Legal Aid] Society to provide counsel at any hearing where the prisoner was potentially at risk of solitary confinement would impose a wholly unjustified financial burden on the Society" adding: "The Society should not be required to provide more than a reasonable person of average means would provide for himself or herself." *Winters v. Legal Services Society*, [1999] 3 S.C.R. 160 at paras. 32, 31.

²⁴ [2001] Alta. C.A. 205.

²⁵ [1986] 2 S.C.R. 573.

²⁶ Although the *Charter* applies to injunctions that may be enforced through criminal law powers of contempt, the court has consistently upheld its decision that the *Charter* does not apply to private activity on the basis that: "The *Charter* is essentially an instrument for checking the powers of government over the individual...To open up all private and public action to judicial review could strangle the operation of society and...could seriously interfere with freedom of contract." *McKinney v. University of Guelph* (1990), 76 D.L.R.(4th) 545 at 633, 644 .

²⁷ [2000] N.S.J. no. 386 at para. 8.

serious and complex enough under *G.(J.)* to find a violation of section 7 of the *Charter* and to order counsel to represent Mr. Mill. Likewise, in *Miltenberger v. Braaten*,²⁸ it was stated that *G.(J.)* could be distinguished because, “Here there is no state action which threatens the security of the respondent’s person. This is a court action between private citizens to determine the custody of their children.” The court also found that there was no evidence that the respondent was indigent, again demonstrating a concern about the facts of the individual case.

The above cases suggest that the courts will be reluctant to hold that section 7 of the *Charter* is engaged when the proceedings involving children are between two private litigants, usually separated/divorced parents – as opposed to child protection hearings between a parent(s) and a government child protection agency. If the state had not been involved in *G.(J.)*, it is not clear that the courts would have found a section 7 right to legal aid. The courts have also applied the test in *G.(J.)* that a fair trial will only require counsel depending on the complexity of the case, the interests at stakes and the abilities of the unrepresented litigants in a case specific manner tailored to the facts of particular cases. As in the criminal law, this makes it difficult to draw a clear or bright line about when the *Charter* requires legal aid.

Nevertheless, there are aspects of *G.(J.)* that could be used to support a right to civil legal aid, particularly in cases where the interests affected are important and in some way implicate the state. In particular, the following statement by the court concerning the complexity of proceedings could be said to apply to most civil litigation in superior courts given the complexity of the relevant rules of civil and trial procedure.

The parties are responsible for planning and presenting their cases. While the rules of evidence are somewhat relaxed, difficult evidentiary issues are frequently raised. The parent must adduce evidence, cross-examine witnesses, make objections and present legal defences in the context of what is to many a foreign environment, and under significant emotional strain. In this case, all other parties were represented by counsel. The hearing was scheduled to last three days, and counsel for the Minister planned to present 15 affidavits, including two expert reports.²⁹

Appellate Deference to the Trial Judge’s Determination of whether a Charter Right to Legal Aid Applies in the Particular Case

A determination by a trial judge that an unfair hearing will or will not occur if legal aid is not provided will receive a significant amount of deference on appeal. Chief Justice Lamer in *G.(J.)* commented that “a trial judge is generally better positioned than a reviewing court to make this determination. He or she is better situated to make an accurate assessment of the complexity of the proceedings and,

²⁸ [2000] S.J. no.599 (Q.B.) at para. 6.

²⁹ *Ibid.* at para. 79.

in particular, the parent's capacities. Moreover, the trial judge is under a duty to ensure a fair hearing, and has the ability to assist the parents in the proceedings, within the limits of his or her judicial role."³⁰ Lower courts have cited with approval this standard of appellate deference.³¹

The facts of *G.(J.)* indicate that appellate deference will not be absolute. The trial judge's determination that counsel was not necessary was overturned because the applicant was represented by counsel at a competence hearing after the custody hearing had been held and the trial judge may have applied the wrong legal test. Nevertheless, *G.(J.)* does suggest that most decisions about whether legal aid is required by the *Charter* will be made by trial judges on the facts of particular cases both inside and outside of the criminal law context. Consequently, both *Charter* applicants and governments will often have to live with the trial judge's decision about whether legal aid is required to ensure a fair hearing.

The Difficulty of Justifying the Denial of Legal Aid Essential to a Fair Hearing Under Section 1 of the Charter

Another factor suggesting that trial judge's rulings on the facts of the particular case will decide the exact contours of the section 7 *Charter* right to legal aid, is the court's reluctance in *G.(J.)* to hold that a denial of legal aid could be justified under section 1 of the *Charter*. Chief Justice Lamer was prepared to decide that controlling legal aid expenditures was a pressing and substantial objective and that the denial of legal aid in the particular case was both rationally connected to this objective and a minimal impairment of section 7 of the *Charter*. Nevertheless, he found that the harmful effects of denying legal aid "far outweigh the salutary effects of any potential budgetary savings."³² Given the reluctance of courts to hold that violations of section 7 of the *Charter* are justified under section 1 of the *Charter* and the fact that the judge will have already decided that legal aid "is essential to ensure a fair hearing where the parent's life, liberty or security is at stake,"³³ the state will in most, if not all, cases be unable to justify the denial of legal aid, once a section 7 violation has been established.

SECTION 15 AND CIVIL LEGAL AID

In *G.(J.)* at para. 112, L'Heureux-Dube J. (Gonthier and McLachlin JJ. concurring) emphasized that "...this case also implicates issues of equality guaranteed by section 15 of the *Charter*. These equality interests should be considered in interpreting the scope and content of the interpretation of the rights guaranteed by section 7. This Court has recognized the important influence of the

³⁰ *Ibid.* at para. 82.

³¹ *Mill v. Hardy, supra* at para. 10.

³² *Ibid.* at para. 98.

³³ *Ibid.* at para. 100.

equality guarantee on the other rights in the *Charter*.” She went on to further state that:

This case raises issues of gender equality because women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings...The fact that this appeal relates to legal representation in the family context for those whose economic circumstances are such that they are unable to afford such representation is significant....In Canada, the feminization of poverty is an entrenched social phenomenon...The patterns of relationships within marriage disproportionately lead to women taking responsibility for child care, foregoing economic opportunities in the workforce, and suffering economic deprivation as a result. ...Issues involving parents who are poor necessarily disproportionately affect women and therefore raise equality concerns and the need to consider women’s perspectives.³⁴

Arguments have been made by both academics and the Ontario Legal Aid Review that a priority for legal funding to accused as opposed to civil litigants may amount to discrimination against women. This argument directly targets state actions in funding legal aid and avoids the state action issues involved when litigants in private litigation claim a *Charter* right to legal aid. At the same time, a direct challenge to the funding decisions and priorities of the state raise more complex issues of justification under section 1 of the *Charter* and appropriate remedy than presented by arguments that section 7 of the *Charter* requires legal aid to be provided to ensure a fair hearing in individual cases. The state might have stronger arguments in the section 15 cases that its decisions about the allocation of scarce resources were entitled to deference under section 1 of the court. In *R. v. Prosper*,³⁵ the court has already indicated its concerns about crafting an appropriate remedy if it defined *Charter* rights to legal aid in a systemic as opposed to a case-by-case fashion.

In addition, it should be noted that Justice L’Heureux-Dube did not make a full section 15 argument but only noted that equality concerns were relevant in defining the section 7 right. To establish a section 15 violation, the applicant would argue that the state’s funding decisions with respect to legal aid have an adverse and discriminatory impact on women and as opposed to men.³⁶ Under the section 15 test in *Law v. Canada*,³⁷ an applicant would have to establish that legal programs discriminated by failing to take into account the disadvantaged position of women within Canadian society resulting in substantively different treatment on the basis of gender and that the benefit of legal aid was withheld in a manner that reflects the stereotypical application of presumed group or personal characteristics or which has the effect of promoting the view that the applicant or

³⁴ *Ibid.* at para. 113.

³⁵ *Supra*, note 1.

³⁶ An alternative argument would be that those who could not afford counsel were an analogous ground of discrimination and the denial of legal aid violated their equality rights in comparison to those who could afford counsel.

³⁷ (1999) 170 D.L.R.(4th) 1 (S.C.C.).

women in general are less capable or worthy of recognition or value as a human being deserving of concern, respect and consideration. Equal respect for human dignity may require that people be able to effectively participate in litigation that determines their rights and obligations.

It is possible that a court might entertain a general right to civil legal aid under section 15 of the *Charter*. At the same time, however, courts might be inclined to determine whether there was substantive discrimination in a contextual manner that reflects similar criteria to that found in *G.(J.)*: namely the seriousness of the interests at stake, the complexity of the proceedings and the capacities of the applicant. Indeed, Justice L'Heureux-Dube took note of these contextual and case by case factors in *G.(J.)* although she was inclined to define the *Charter* right to legal aid in custody proceedings in a broader fashion than the majority of the court in that case.³⁸

CONCLUSION

This legal opinion has surveyed the arguments for a *Charter* right to legal aid in both the criminal and civil contexts. Although there is a strong case in the abstract for a general right to legal aid in criminal cases, this issue has not been decided by the Supreme Court and the bulk of authority supports the view that a right to legal aid only exists in those cases where the unavailability of counsel would deprive the accused of a fair hearing. It has also found that in the important case of *G.(J.)*, the Supreme Court has extended this approach to child custody proceedings. The court has not declared a general right to legal aid but has indicated that section 7 of the *Charter* may require legal aid depending on the complexity of the proceedings, the interests at stake and the abilities of the otherwise unrepresented litigants. Lower courts have, however, so far been reluctant to extend *G.(J.)* to purely private litigation not involving the state. At the same time, the case-by-case and fair hearing approach taken by Canadian courts in both criminal and civil cases with significant state involvement suggests that the state will have difficulty justifying under section 1 of the *Charter* limits on legal aid that deprive a person of a fair hearing and that courts will order effective remedies under section 24(1) of the *Charter* in individual cases to protect a *Charter* right to legal aid.

³⁸ *Ibid.* at paras. 120, 125.